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# Ethic of Care as an Ethic for Lawyers, The

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# The Ethic of Care as an Ethic for Lawyers

STEPHEN ELLMANN\*

In her pathbreaking psychological study, *In a Different Voice*,<sup>1</sup> Carol Gilligan argues that an ethic of justice or rights, based on relentless deduction from abstract moral principles to the handling of concrete moral situations, and preeminently concerned with the identification and protection of each person's rights against others' interference, is only one form of mature human moral reasoning. The other, the "ethic of care," focuses not on abstract rights and duties, but rather on the connections between people. Honoring connection by seeking to understand the concerns of all those affected by a given situation, the ethic of care acknowledges a responsibility to minimize harm and seeks those steps that in the particular, concrete setting will meet this goal. The ethic of care, Gilligan implies, is distinctively the ethical standpoint, or voice, of women.<sup>2</sup> Whether or not this characterization is true—and it has been the subject of intense debate<sup>3</sup>—Gilligan is careful to say that the ethic of care is also characteristic

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\* Associate Professor of Law, New York Law School. I thank Naomi Cahn, Karen Gross, Quintin Johnstone, Nancy Rosenbloom, Richard Sherwin, Michael Sinclair, Laura Stein, and Harry Wellington for their helpful comments on this piece, and New York Law School for financial support. I also appreciate the insights into the ethic of care that my students at New York Law School and at Columbia Law School have offered in class discussions over the past several years.

1. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

2. Gilligan emphasized that she was not making statistical claims for the predominance of the ethic of care among women as compared to men, *id.* at 2, but there and elsewhere, as critics have noted, she emphasized the ethic of care's association with women. See, e.g., Michele M. Moody-Adams, *Gender and the Complexity of Moral Voices*, in *FEMINIST ETHICS* 195, 197 (Claudia Card ed., 1991) (citing GILLIGAN, *supra* note 1, at 3).

3. For examples of this debate from legal scholarship, compare Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 14-36 (1988) (describing the joys and terrors of women's lives, understood in terms of the "connection thesis," which holds that "[w]omen are actually or potentially materially connected to other human life. Men aren't."); Carrie Menkel-Meadow, *Portia in a Different Voice: Reflections on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 41 (1985) (pursuing the implications of women's "different voice," as Gilligan and others have heard it, while observing that she finds "persuasive, though not unproblematic, the notion that values, consciousness, attributes, and behavior are gendered") with Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1040, 1050-54 (1992) (arguing that "[t]rying to correlate a female style of lawyering with a particular set of attributes ascribed to women, such as those of an ethic of care, is not only inaccurate, [but] dangerous"); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 624-25 (1990) (suggesting that "different voice" theories both lack adequate empirical support and reinforce limiting stereotypes of women); Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L. REV. 109, 120-51 (1991) (extensively criticizing "different voice theory," which Schroeder sees as infected by masculinist visions of men and women, arbitrary in its assessment of evidence of

of at least some men. As she presents it, the ethic of care is a form of moral reasoning that should play a part in the moral understanding of every mature person, male or female. If that is right, then it should also

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the differences between men and women, and empty in its implications for resolving issues of moral or legal responsibility); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 802-13, 840-43 (1989) (rejecting "Gilligan's core claim that women are focused on relationships while men are not" and characterizing "relational feminists" such as Gilligan as rehabilitating an ideology of women's "domestic" virtues, an ideology which can limit women's nondomestic aspirations), and *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 27, 73-75 (1985) [hereinafter *Feminist Discourse*] (comments of Catharine MacKinnon, expressing ambivalence about Gilligan's description of women's different voice, even though the values of care are admirable ones, since the fact that women speak in a caring way does not reveal woman's true voice, as long as "[man's] foot is on her throat").

For examples of the psychological critiques of Gilligan's findings of a gender difference in moral reasoning, see LAWRENCE KOHLBERG ET AL., MORAL STAGES: A CURRENT FORMULATION AND A RESPONSE TO CRITICS 17-29, 121-50 (1983); Gertrude Nunner-Winkler, *Two Moralities? A Critical Discussion of an Ethic of Care and Responsibility versus an Ethic of Rights and Justice*, in MORALITY, MORAL BEHAVIOR, AND MORAL DEVELOPMENT 348 (William M. Kurtines & Jacob L. Gewirtz eds., 1984); CAROL TAVRIS, THE MISMEASURE OF WOMAN 79-90 (1992); Lawrence J. Walker, *Sex Differences in the Development of Moral Reasoning: A Critical Review*, in AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES (Mary J. Larrabee ed., 1993) (article originally published in 1984) [hereinafter ETHIC OF CARE]; John M. Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597 (1983); Catherine G. Greeno & Eleanor E. Maccoby, *How Different Is the "Different Voice?"*, 11 SIGNS 304 (1986); Zella Luria, *A Methodological Critique*, 11 SIGNS 316 (1986); Debra Nails, *Social-Scientific Sexism: Gilligan's Mismeasure of Man*, 50 SOC. RES. 643 (1983). But see Diana Baumrind, *Sex Differences in Moral Reasoning: Response to Walker's (1984) Conclusion that There Are None*, in ETHIC OF CARE, *supra* at 177.

One issue of particular concern in analyzing the sources of an ethic of care is the possibility that its presence among more women than men in Gilligan's interviews was a function of class and privilege, and that unprivileged or oppressed men and women—relatively though not absolutely underrepresented, it seems, among Gilligan's subjects—may share, or offer their own variations upon, the ethic of care of relatively privileged women. See Carol B. Stack, *The Culture of Gender: Women and Men of Color*, 11 SIGNS 321, 322-23 (1986) (noting that "under conditions of economic deprivation there is a convergence between women and men in their construction of themselves in relationship to others" and in their "vocabulary of rights, morality, and the social good").

For responses and further inquiry by Gilligan, see Carol Gilligan, *Moral Orientation and Moral Development*, in WOMEN AND MORAL THEORY 10 (Eva F. Kittay & Diana T. Meters eds., 1987) [hereinafter Gilligan, *Moral Orientation*]; Carol Gilligan, *Reply by Carol Gilligan*, 11 SIGNS 324 (1986) [hereinafter Gilligan, *Reply*]; *Feminist Discourse, supra*, at 75-77 (comments of Carol Gilligan). Another influential account of care similarly characterizes this ethical approach as a "feminine" one, and suggests that both biological and psychological factors may lead to women having "easier and more direct access to caring." NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION 2, 128-30 (1984). For a study by a lawyer and a psychologist documenting women lawyers' greater use of care reasoning as compared to men, see generally RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS (1989). For a recent, less technical critique, see Katha Pollitt, *Marooned on Gilligan's Island: Are Women Morally Superior to Men?*, NATION, Dec. 28, 1992, at 799.

play a part in the moral understanding of every lawyer. Yet, it seems fair to say that the current codes of legal ethics embrace a focus on rights, a focus that gives little direct attention to the possible bearing of considerations of care.

This essay's purpose is to consider how the ethic of care might alter the contours of lawyers' ethical responsibilities. I do not ask this question as a disinterested observer, for it is a central lesson of feminist and other teachings that such an observer does not exist. I am a liberal and a feminist; I find the claims of freedom and autonomy powerful; I also find the ideals of care and community deeply attractive. I write in order to understand how the ethic of care might affect a world of legal practice that combines striking courage in the defense of rights with grasping aggression in the pursuit of advantage, and in order to understand the true extent of the intersection or incompatibility of two sets of moral claims, both of which I believe have great value.

I approach the question of the impact of the ethic of care on legal ethics by following a particular strategy that Part I of this essay explains and seeks to justify. First, I seek to *reason* along the lines suggested by the ethic of care, rather than treating care as somehow beyond the realm of reason. Second, I insist that considerations of care should not be confined to a special sphere of private, intimate association, but instead should be fruitfully applied in a very wide range of situations of moral conflict. Third, I maintain that the ethic of care is not an ethic of relativism, but rather considers some moral considerations more weighty than others—and accordingly I seek to identify the obligations which lawyers would acknowledge if they accepted the ethic of care as the *central* source of their moral responsibilities.

With these premises in place, I will turn to the ethical duties of lawyers. In Part II, I defend the proposition that the caring lawyer can (and will) properly care more for some people than for others—rather than being obliged by her acknowledgement of the value of care to care equally for everyone. This proposition is a fundamental one, for it establishes the appropriateness, in terms of the ethic of care, of lawyers' undertaking the "representation" of clients—a relationship in which they will devote more care to their clients than to the many other people whom their representation may affect.

Although Part II establishes that the ethic of care does not call for the dismantling of the very institution of legal representation, subsequent sections of the article demonstrate that this ethic does call for important changes in lawyers' ethics. In particular, Part III argues that lawyers' choices of cases would be significantly affected by their acceptance of the centrality of considerations of care; Part IV maintains that the nature of lawyers' personal relationships and interactions with their clients would

also change in important ways; and Part V demonstrates that the ethic of care would also affect, and qualify, such important elements of the concept of client representation as the duty of zeal. Despite these changes, however, we will also see in the course of this analysis that the lawyer-client relationships called for by the ethic of care are not *vastly* different from those permitted under existing rules. In the concluding section of this essay, I will suggest the significance of this finding for a broader understanding of the role of care thinking in our moral lives.

### I. REASONING IN CARE TERMS

To trace the potential shifts in lawyers' obligations resulting from an application of the ethic of care, we must first examine how the implications of the ethic of care can properly be identified. It will not do, after all, to "apply" the ethic of care in some fashion that is inconsistent with its own internal logic—to try, as we might put it, to care uncaringly. I will argue that we can examine the implications of the ethic of care by reasoning from its core concerns, but before I develop that argument I will first briefly sketch those core concerns of care as Gilligan illustrates them.

Gilligan herself says that "[a]s a moral perspective, care is less well elaborated [than "justice" reasoning], and there is no ready vocabulary in moral theory to describe its terms."<sup>4</sup> But she makes plain that care is not simply an emotional response such as empathy. Nor is it a gloss on moral reasoning of a fundamentally different type, such as "the mercy that tempers justice."<sup>5</sup> Instead, "care represents a way of knowing and a coherent moral perspective."<sup>6</sup> This perspective emphasizes people's mutual connections rather than their solitary autonomy. Seeing connection as integral to human existence, the ethic of care considers a denial of that connection morally questionable; "detachment is *the* moral problem."<sup>7</sup> In this moral framework, the recognition of connection gives rise to concomitant responsibilities to care for those with whom connection is forged. But these responsibilities may vary tremendously in light of the particulars of the situation in which they arise, and so the ethic of care eschews sweeping principles in favor of sincere effort to respond to the particular context in which moral choice must be made. Moreover, the ethic of care suggests that the response to moral conflict is not to seek agreement on moral truth, but rather to try to elicit understanding among the people in connection.<sup>8</sup>

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4. Gilligan, *Moral Orientation*, *supra* note 3, at 24.

5. *Id.*

6. *Id.* at 29.

7. *Id.* at 31.

8. *Id.*

All of this is abstract. An example, by now a well-known one, will make its meaning clearer. This example, perhaps the classic illustration of the contrast between care and justice reasoning, oddly enough is drawn not from the reasoning of adults but from Gilligan's interviews with two eleven year old children, Jake and Amy, who were asked to respond to the hypothetical of "Heinz and the druggist," in which Heinz must decide whether to steal a drug that his dying wife needs to live, and which he cannot afford to purchase.<sup>9</sup> (This hypothetical had been used extensively by Lawrence Kohlberg. Gilligan's work both emerges from and sharply criticizes his conception of moral development, as the refinement of reasoning about justice.<sup>10</sup>) Faced with this hypothetical, Jake decides that Heinz should steal the drug, because life is more important than property. For Gilligan, this rationale reflects an approach in which a complex moral situation is reduced to the equivalent of, in Jake's words, "a math problem with humans."<sup>11</sup> Amy, viewing this situation through the ethic of care, does not pursue the issue of the ranking of life and property. Instead, to her "the puzzle in the dilemma . . . lie[s] in the failure of the druggist to respond to the wife."<sup>12</sup> Her solution, as Gilligan hears it, is to elicit the druggist's recognition of his responsibility by fostering communication between him and Heinz: "[I]f Heinz and the druggist had talked it out long enough, they could reach something besides stealing."<sup>13</sup> In context, and through communication, the people affected can reach an accommodation that reflects the care that should bind them together.

However distinctive and however profound Amy's moral approach may be, it remains to be seen whether the approach that her answers to the Heinz dilemma exemplify—the ethic of care—yields any insights concerning the proper elements of legal ethics. To draw out those insights, we must establish: first, that we can reason from the ethic of care (otherwise any "caring" responses we might feel could only be linked intuitively, or emotionally, to this ethic); second, that we can reason from this basis in the context of lawyers' professional lives, rather than only in connection with such personal concerns as those of home and family; and, third, that when we reason from the ethic of care, we will not be entering a field of ethical relativism, in which every moral assertion has equal claim on us,

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9. For a very helpful analysis of the comments of Jake and Amy, see Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988).

10. Kohlberg developed his theories over three decades of work. For a late statement of his views, reflecting his evaluation of the criticisms of Gilligan and others, see generally KOHLBERG ET AL., *supra* note 3.

11. GILLIGAN, *supra* note 1, at 26-27.

12. *Id.* at 29.

13. *Id.*

but rather we will be able to identify certain moral considerations that deserve greater weight than others.

Can we reason in terms of the ethic of care? Choosing to do so may be controversial, for Gilligan herself insists that the ethic of justice is incomplete because it places too much emphasis on reasoning from abstract principles and not enough on the concrete, practical assessment of particular situations.<sup>14</sup> Gilligan has even been seen as rejecting the idea of "rationality" altogether.<sup>15</sup> I do not take this to be her intention, however, nor the necessary content of an ethic of care. Though there may be moral problems for which the care perspective offers no demonstrably "right" answer, the same is true of other moral frameworks as well. To acknowledge uncertainty, even to disparage the notion of the ineluctable power of particular frameworks of argument to generate convincing answers, is not to abandon reason. Nor is an emphasis on the role of emotion in human decisionmaking an abandonment of reason; no one's reasoning is truly bloodless, and acknowledging the emotional commitments that influence our efforts to make moral judgment does not require us to believe that moral judgment consists of nothing but blind or intuitive leaps of faith. As Gilligan has commented, care, like justice, is a "moral perspective . . . that organize[s] both thinking and feelings."<sup>16</sup>

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14. Indeed, Gilligan insists that several women in one of her studies, women who she says "clearly articulate a postconventional [i.e., fully developed] metaethical position," would not be "considered principled in their normative moral judgments" of hypothetical dilemmas framed by Lawrence Kohlberg for his studies of moral development. GILLIGAN, *supra* note 1, at 101. Women's insistence on "the particular," Gilligan argues, "allows the understanding of cause and consequence which engages the compassion and tolerance repeatedly noted to distinguish the moral judgments of women," *id.* at 100, and the judgments women make "shift[] . . . away from the hierarchical ordering of principles and the formal procedures of decision making." *Id.* at 101.

15. See Broughton, *supra* note 3, at 626, 639 (associating Gilligan's work with a "crude romanticism that rejects rationality uncritically," and arguing that "Gilligan mistakenly assumes that to reject Kohlberg's theory is to dispense with rationality as a basis for moral judgment, at least for women"). Compare the approach of Nel Noddings, who characterizes care as "essentially nonrational" and says that "[i]f rational-objective thinking is to be put in the service of caring . . . [a]t times we must suspend it in favor of subjective thinking and reflection, allowing time and space for *seeing* and *feeling*," but also insists that as a caring person, "I do not respond out of blind sentiment, but I put my best thinking at the service of the ethical affect." NODDINGS, *supra* note 3, at 25-26, 171.

16. Gilligan, *Reply*, *supra* note 3, at 326. See also Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes*, 75 IOWA L. REV. 1135, 1141-43 n.12 (1990) (emphasizing that "Amy's response [to the Heinz dilemma] can be explained as . . . more logical, rational, and mathematical" than Jake's). Sara Ruddick, who has drawn from an analysis of mothering a conception of "attentive love" that bears a family resemblance to the ethic of care, similarly insists on the reasoned quality of the phenomenon she studies. She finds in mothering a "discipline of maternal thought" and a "unity of reflection, judgment, and emotion." She maintains that "maternal thinking is no more interest-governed, no more emotional, and no more relative to a particular reality (the growing child) than the thinking

At the same time, I want to emphasize the range of conclusions that can be reached when reasoning within this framework. I do not claim that all conclusions are equally plausible, and I will offer my own judgments about the implications of care reasoning, but the ethic of care does not generate one and only one set of guidelines for lawyers or anyone else. Unitary conclusions would be inconsistent with the contextual character of care reasoning, in which the details of particular situations are central to the identification of the nature of moral responsibility. Demanding only one possible outcome would also be inconsistent with the idea of the ethic of care as a *framework* for moral judgment. Other moral frameworks, such as theories of natural rights or of utilitarian calculation or of biblical mandate, do not produce any such unitary set of approved conclusions. Nor, as we will see, does the ethic of care.<sup>17</sup>

One illustration will demonstrate this ambiguity in the implications for lawyers of the ethic of care. Consider the case of rape. This is a terrible crime, and it is entirely appropriate to feel a great deal of sympathy for the rape victim. Feeling such sympathy, a lawyer might have no hesitation in concluding that her responsibility lay in prosecuting rape cases so as to compensate in some measure for the harm done to the victim and to protect future victims from such harm. At the same time, another lawyer might feel sympathy for the defendant, whether because he came from a troubled or disadvantaged background, or simply because she empathized with the fear and trembling that anyone facing the power of the state and the prospect of prison might experience. This lawyer might see it as her responsibility to provide the defendant with all the personal support and legal zeal that the law allows. She might feel this even while believing her client to be guilty; of course, her determination to fight on his behalf might be even more intense if she also doubted the accuracy of the case against him.

These polar positions by no means exhaust the range of possibilities. Not every criminal defense lawyer necessarily would feel so committed to her client; less moved by her client's plight and more incensed by the victim's suffering, a defense lawyer might believe that her obligation of care for the victim required her to limit the vigor of her defense, either with or without the client's consent. A different lawyer, either prosecutor or defense counsel, might look for a way to bridge the distance between

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that arises from scientific, religious, or any other practice." Sara Ruddick, *Maternal Thinking*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 213, 214 (Joyce Trebilcock ed., 1983).

17. Jeanne Schroeder forcefully argues that "a well-trained lawyer could form a nonface-tious argument supporting almost any masculinist legal standard or result within the different voice rhetoric." Schroeder, *supra* note 3, at 138. Again, however, this is probably true of any other putatively all-embracing moral framework as well, and does not mean that the ethic of care is, as Schroeder urges, "analytically sterile." *Id.* at 137.



alleged rapist and rape victim, out of a feeling that the worst moral error is a denial of connection and that the ideal resolution of differences lies in a restoration or establishment of relationship. It may be hard for most readers, as it is for me, to accept such a response to rape as an alternative to punishment, but Gilligan's account of the ethic of care strongly suggest that she sees such responses as appropriate in at least some contexts.<sup>18</sup> Yet another lawyer, say a lawyer appointed to represent the defendant, might see the most important object of her caring as neither the defendant nor the victim, but rather her own family. For example, if her children were shunned at school or her family's income were seriously reduced as a result of her taking the case, she might seek to withdraw out of care for her loved ones. One more lawyer, remembering her own experience as a victim of rape, might find the case impossible to handle; she might see herself as the one most in need of her own care. Every one of these lawyers would be approaching moral problems through the ethic of care—yet their conclusions about the implications of that ethic for their behavior as lawyers would be radically different.

It might be argued that this list of alternative, "caring" conclusions suggests not only that the ethic of care offers no simple answers but that it offers no answers at all to questions of professional ethics. A focus on individual care and hurt arguably provides a good way to approach moral issues within intimate personal associations such as the family, but is simply inapplicable to problems of professional life. Moral problems at

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18. Amy's response to the problem of Heinz and the druggist exemplifies this approach. See *supra* text accompanying notes 9-13; see also Menkel-Meadow, *supra* note 3, at 50-55. So does Gilligan's account of a medical student's caring rationale for not turning in a proctor who violated a school rule against drinking. This student explained that turning the proctor in "would dissolve the relationship between them and thus cut off an avenue for help. In addition, this student raises the question as to whether the proctor sees his drinking as a problem." Gilligan emphasizes the student's hesitancy about the proctor's own understanding, and says that "[t]he question of what responses constitute care and what responses lead to hurt draws attention to the fact that one's own terms may differ from those of others. Justice in this context becomes understood as respect for people in their own terms." The caring perspective also seems to lead away from attention "to the question of whether the alcohol policy itself is just or fair." The upshot seems to be a turn away from rule enforcement and towards the search for communication and understanding. Gilligan, *Moral Orientation*, *supra* note 3, at 24-25.

If this approach is appropriate in rape cases at all, we must ask *which* rape cases lend themselves to the approach. My own intuition initially was that a communicative response would be especially inapt in cases of rape by strangers, when the victim never had a relationship with her attacker and ought not to be required to undertake one now. My colleague Karen Gross points out, however, that in cases of rape by an acquaintance or lover, the victim's sense of betrayal might make the resumption of relationship abhorrent. Our resolution of this problem, in turn, may be affected by our response to the separate, and also important, question of *how* this approach should be employed. Surely it is much more palatable as a supplement to punishment (and, for the victim, a voluntary one) than as an alternative.

work are impersonal ones, this argument continues, and the personal bonds that are so important in guiding intimate behavior are significantly weaker, and significantly less appropriate as reference points, in life outside the home.<sup>19</sup>

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19. Kohlberg took such a position in responding to Gilligan's criticism of his work. Acknowledging that "the 'principle' of altruism, care, or responsible love has not been adequately represented in our work," he went on to suggest that the domain of care was a relatively narrow one, and read Gilligan as arguing that "our moral dilemmas and scoring systems were limited in the sense that they did not deal with dilemmas (or orientations to those dilemmas) of *special relationships and obligations*." Special relationships include relations to "family, friends, and to groups of which the self is a member." KOHLBERG ET AL., *supra* note 3, at 20 (emphasis in original). In his judgment, "special relationship dilemmas may elicit care responses which supplement and deepen the sense of generalized obligations of justice," but "what Gilligan calls an ethic of care is, in and of itself, not well adapted to resolve justice problems; problems which require principles to resolve conflicting claims among persons, all of whom in some sense should be cared about." *Id.* at 21-22. For a critique of arguments for the "primacy of justice" over care, see Owen Flanagan & Kathryn Jackson, *Justice, Care, and Gender: The Kohlberg-Gilligan Debate Revisited*, in *ETHIC OF CARE*, *supra* note 3, at 69, 78-84.

From the perspective of an advocate of women's rights in the law, Joan Shaughnessy has also argued that the role of care in the world of law is inevitably restricted because "fundamentally . . . the law is not nurturing . . . . Law is regulated force." Joan M. Shaughnessy, *Gilligan's Travels*, 7 L. & INEQ. 1, 20 (1988); see also Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2122 (1989) (emphasizing that "our public rulemaking often begins where our shared values and community consensus end").

For a somewhat different argument concerning the domain of care, an argument derived from a conception of care as highly personalized and resting in part on a fear of the depersonalization of many institutional or collective contexts in our society, see NODDINGS, *supra* note 3. Noddings emphasizes the danger that people acting in institutions will provide not attentive "caring" for individuals but "abstract problem solving," *id.* at 25-26, 103. Observing that laws "are limited, and . . . may support immoral as well as moral actions," *id.* at 103, she also comments that utilitarian thinking "may be as close to the ethical as we can come in the contemporary political arena, but this seems to count against our political machinery rather than for utilitarian thinking in social life." *Id.* at 154. Even if the moralities of home and workplace were radically separate, it would not follow that one was inferior to the other. At one point, however, Kohlberg apparently suggested that a relatively underdeveloped form of moral reasoning, illustrated by Gilligan's phrase "helping and pleasing others," GILLIGAN, *supra* note 1, at 18, was "a functional morality for housewives and mothers." Broughton, *supra* note 3, at 616-17 (quoting Lawrence Kohlberg & Robert Kramer, *Continuities and Discontinuities in Child and Adult Moral Development*, 12 HUM. DEV. 93, 108 (1969)). Gilligan's study of the "different voice" was in a sense directed to demonstrating that women's moral thinking had been deprecated because it had been misunderstood. Although Kohlberg agreed, as indicated above, that his method of measuring moral reasoning did not capture the full domain of moral judgment, he did not concede that his method of measuring moral reasoning in fact scored women as less developed than men. *Id.* at 130. Most studies of gender differences using Kohlberg's measures have apparently found no significant differences between males' and females' capacity for justice reasoning. See Walker, *supra* note 3. But see Baumrind, *supra* note 3. There is evidence, however, that women are more disposed to employ care reasoning (despite their ability to do justice reasoning) than men are. See Gilligan, *Moral Orientation*, *supra* note 3, at 25-27; Gilligan, *Reply*, *supra* note 3, at 328-31; but see Kohlberg & Kramer, *supra*, at 131-34. Such a difference in preferred orientation would itself point to the existence of gendered "differences in moral psychology." See Flanagan & Jackson, *supra*, at 80.

This argument is not without force, but its insistence on the incompatibility of domestic and professional morality is much overstated. After all, the idea that the moral life of intimate association should pay no heed to principles of ethical behavior between strangers seems quite wrong. The personal is (often) the political, as feminists have taught. Contracting parties normally should not lie to each other, and neither should spouses or friends; the strong ordinarily should not bully the weak, even when they live with each other; censors generally should not deny us the freedom to read, and neither should parents paternalistically deny their children the chance to shape lives of their own.<sup>20</sup> It seems equally wrong to maintain that professional interaction leaves no room for a focus on individual care and hurt. As an empirical matter, there simply *is* room—people in professional contexts do respond to the calls of affection, loyalty, and sympathy. As a normative matter, moreover, there should be room—at least as long as we believe that justice should be tempered with mercy, and the rigors of the law eased with equity.<sup>21</sup>

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20. As my phrasing of these obligations in the text is meant to suggest, most or all of them may be subject to exceptions. Particularly from a care perspective, few if any rules hold always and absolutely, regardless of context. Nevertheless these obligations seem to me to be generally valid, at work and at home. For a cogent demonstration of the need to take considerations of justice into account even in the personal sphere, see Marilyn Friedman, *Beyond Caring: The De-Moralization of Gender*, in *ETHIC OF CARE*, *supra* note 3, at 258, 263-66. Friedman also maintains, as I do, that care is “relevan[t] . . . to the public domain.” *Id.* at 266-67. See also Susan M. Okin, *Reason and Feeling in Thinking about Justice*, in *FEMINISM AND POLITICAL THEORY* 15, 30-32 (Cass R. Sunstein ed., 1990) (linking justice and care together, by arguing that to maintain a sense of justice “we must develop considerable capacities for empathy and powers of communicating with others about what different human lives are like . . . [and] a great commitment to benevolence; to *caring* about each and every other as much as about ourselves”).

21. To be sure, there are at least some questions for which one moral framework, be it justice or care, will be much more appropriate than the other. Flanagan and Jackson make this point clear with their examples of “someone who sees the problem of repaying or forgiving foreign loans as an issue of *love* between nations; or a mother who construes all positive interactions with her children as something they are *owed*.” Flanagan & Jackson, *supra* note 19, at 72. Studies suggest, moreover, that particular problems tend to elicit reasoning focused more in one framework than the other, even from people who are capable of reasoning in both. *Id.*; KOHLBERG ET AL., *supra* note 3, at 132 (describing a study “suggest[ing] that both [justice and care] considerations are used by both sexes and that preferential orientation is largely a function of the type of moral problem defined and of the socio-moral atmosphere of the environment in which the dilemma is located”); Gilligan, *Moral Orientation*, *supra* note 3, at 27; JACK & JACK, *supra* note 3, at 53-55, 70-71, 189 tbl. 1 (finding such shifts in framework in the lawyers whom they interviewed, and commenting that “[t]he more the interview fixed attorneys in their legal role, the more they talked like lawyers and the less care thinking was visible”); see also Moody-Adams, *supra* note 2, at 202-09 (arguing that Gilligan generalized too much about the character of women’s moral reasoning from studying women’s choices about abortion; women’s “voice” on other questions might have sounded very different). I do not claim that either of these two moral frameworks applies to *all* moral questions. Rather, my point is that the area of overlap is substantial and includes, as the remainder of this essay will seek to show, a range of important issues of legal ethics.

To say that considerations of care have a role in professional and, in particular, lawyerly moral judgment does not, however, explain what that role is. If considerations of care are relevant only as a salve to ease the harsh pain of a legal decision, then they are merely ancillary and subordinate to the real work of moral reasoning.<sup>22</sup> I propose here to describe a vision of the obligations lawyers would live by if the ethic of care were the central source of their moral responsibilities.<sup>23</sup>

Because the centrality of considerations of care will be my starting point, it is important to ask whether the ethic of care permits a conception of moral reasoning that labels one consideration more central than others. Amy's response to the dilemma of Heinz and the druggist at first glance seems to suggest that such ranking is inconsistent with care thinking.<sup>24</sup> Kohlberg apparently expects sophisticated answers to this dilemma to rest on a priority of the claims of life as against the claims of property,<sup>25</sup> and Jake's response adopts exactly this ranking, albeit in relatively unsophisticated fashion.<sup>26</sup> In contrast, Amy resists the hypothetical's implicit demand for prioritization. Although Amy is only a child, Gilligan later characterizes the thinking of *mature* care reasoners as "shift[ing]," like Amy's, "away from the hierarchical ordering of principles."<sup>27</sup> Seeking a resolution through communication rather than through the ranking of

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22. See Gilligan, *Moral Orientation*, *supra* note 3, at 24 (describing "interpretations of care [that] leave the basic assumptions of a justice framework intact"); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1878, 1923 (1988) (arguing that "[s]tirring a bit of connection and responsible nurturance in the pot of powerful disengagement of our judges is hardly the kind of transformative response that feminist insights demand").

23. Thus, this essay does not explore in depth the practical question—perhaps a very pressing one for some lawyers—of how a caring lawyer should act when her colleagues or superiors seek to prevent her from acting as she believes the ethic of care suggests she should. The ethic of care does speak to this question, both by emphasizing the propriety of the lawyer treating herself as one of the objects of her care (and so, for example, refraining from moral stands that would reap disastrous censure from her colleagues), see *infra* text accompanying notes 47-55, and by suggesting the desirability of communicative rather than divisive tactics for resolving such conflicts, see *supra* note 18 and accompanying text. Here, however, I will generally assume that lawyers as a profession have acknowledged the centrality of the ethic of care, and ask what this acknowledgement would actually mean. (I do not, however, make the same hypothetical assumptions about clients. Instead, this essay takes the question of how caring lawyers should respond to uncaring clients as one of the central issues to be resolved in understanding the implications of the ethic of care.)

24. See *supra* text accompanying notes 9-13.

25. See KOHLBERG ET AL., *supra* note 3, at 86-87.

26. GILLIGAN, *supra* note 1, at 27 (noting that Jake's judgments "are scored as conventional on Kohlberg's scale," that is, as "anchored in the shared conventions of societal agreement," rather than as reflecting a higher moral stage of "principled" reasoning "rest[ing] on a free-standing logic of equality and reciprocity").

27. *Id.* at 101.

rights, Amy perhaps exemplifies a more general proposition that no claim is more important than another in the purview of the ethic of care.

That interpretation, however, is belied by the very name of this style of reasoning, the "ethic of care." It seems clear that the ethic of care does value some things more than others—most plainly, care and connection above the "right to indifference."<sup>28</sup> Gilligan herself speaks of certain "ideals of human relationships—that everyone will be treated with equal respect and that no one will be left alone or hurt."<sup>29</sup> She has also stated unequivocally that "[t]o think about issues of care and responsibility is much better than to ignore them. To see detachment as morally problematic is better than not to see it as problematic at all."<sup>30</sup> Similarly, in a striking passage in their study of care and rights reasoning in lawyers, Rand Jack and Dana Crowley Jack offer an example of what they characterize as perhaps "the ultimate challenge that care-oriented attorneys present to the legal system"<sup>31</sup>—a feminist argument "assert[ing] that the human need for shelter, food, and clothing is more important than property rights and call[ing] for 'explicit recognition of this *hierarchy of values*.'"<sup>32</sup> Moreover, it is difficult to conceive of moral reasoning that reaches any conclusions at all if the reasoning does not at some point grant one value greater weight than another, and Gilligan in no way endorses moral paralysis. The ethic of care resists treating moral issues as mathematical equations, stripped of context and resolved by abstraction; it does not resist value judgment.<sup>33</sup>

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28. See Spiegelman, *supra* note 9, at 250 (table of aspects of "Jake's Ladder" and "Amy's Web").

29. Martha Saxton, *Are Women More Moral than Men?: An Interview with Psychologist Carol Gilligan*, Ms., Dec. 1981, at 66. Gilligan would probably see the ideal of equal respect as the focus of the ethic of justice, while the ideal of freedom from hurt would be a matter of care.

30. *Feminist Discourse*, *supra* note 3, at 60-61. Gilligan has also implied that "women are at the present time the custodians of a story about human attachment and interdependence, not only within the family but also in the world at large," and stated explicitly that "[t]he promise in joining women and moral theory lies in the fact that human survival, in the late twentieth century, may depend less on formal agreement than on human connection." Gilligan, *Moral Orientation*, *supra* note 3, at 32.

31. JACK & JACK, *supra* note 3, at 168.

32. *Id.* at 167, quoting CHRISTINE L.M. BOYLE ET AL., A FEMINIST REVIEW OF CRIMINAL LAW 47 (1985) (emphasis added).

33. Nor can it altogether resist abstraction. As Katharine Bartlett pointed out in her insightful discussion of feminist practical reasoning, "feminist methods require the process of abstraction, that is, the separation of the significant from the insignificant." Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 856 (1990); see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586 (1990) (emphasizing the need for "categories," instead of a view that "every experience is unique and no categories or generalizations exist at all," and urging "only that we make our categories explicitly tentative, relational, and unstable"). Although Bartlett and Harris are not describing "care reasoning" as such, the need for abstraction or categories should be acknowledged in this context as well.

To capture this position, I call considerations of care not "supreme," but "central."<sup>34</sup>

Let us consider, therefore, the implications of making care central for the ethical duties of lawyers. I do not mean to parse every aspect of lawyers' ethical obligations in light of the impact of care. Instead, this essay will answer a single, fundamental question: For whom should a care-minded lawyer care, and with what intensity? As we will see, the answer to this question carries with it a series of implications for the status

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34. In *In a Different Voice*, Gilligan herself does not appear to endorse making care *more* central than justice in moral reasoning. Instead, she envisions a convergence of these two perspectives, GILLIGAN, *supra* note 1, at 174, and suggests that men and women each need to learn the lessons of the other's moral perspective. *Id.* at 163-64. She speaks to similar effect in *Feminist Discourse*, *supra* note 3, at 60-61. *But see* Owen J. Flanagan, Jr. & Jonathan E. Adler, *Impartiality and Particularity*, 50 SOC. RES. 576, 587 (1983) (observing that Gilligan on occasion seems to treat care morality as superior to justice morality). To say that care is central is not necessarily to depart from the convergence thesis, but to the extent that my focus on care does implicitly depart from that thesis it does so in order to clarify the implications of taking care very seriously. When we understand these implications better, we can also better decide what sort of convergence we might prefer—not necessarily a simple question at all, as Flanagan and Adler suggest. *Id.* at 593-95; *see also* Flanagan & Jackson, *supra* note 19, at 75-77 (discussing the potential psychological barriers to "inculcating moral sensibilities which support both a rich sense of justice and care and a well developed sense of autonomy and connection in one and the same agent").

It is important to add that even the notion of convergence of care and justice may prove too narrow, for there may well be other crucial elements of people's moral judgments not really captured by either of these frameworks. *See, e.g.,* Nails, *supra* note 3, at 657-60 (faulting both Gilligan and Kohlberg for adopting hierarchical models of human moral development, and suggesting that perhaps "the many multifariously intricate and elusive qualities we properly associate with 'good individuals' do not lend themselves to scaling"). Courage, for example, surely a moral virtue, seems to have roots partly in aspects of character encompassed neither in justice nor in care reasoning. Lawrence A. Blum, *Gilligan and Kohlberg: Implications for Moral Theory*, 98 ETHICS 472, 483 (1988).

The moral issue of the proper domains of considerations of care and of rights thinking resembles what might be described as the social issue of the proper roles of communitarian solidarity and individual rights in shaping political structures, legal doctrine, and social life generally (although it would be a mistake simply to equate care and communitarianism); *see* Schroeder, *supra* note 3, at 128-30. This social issue has been the subject of extensive discussion in recent years. For a sampling of positions taken in this debate, *see, e.g.,* MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 179, 183 (1982) (envisioning a social life characterized and enhanced by communitarian engagement); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146-65 (1991) (defending the value of the concept of rights, and urging critical legal scholars not to "discard" rights but to reconstitute them); Massaro, *supra* note 19, at 2106-27 (questioning the value of "empathy" as a guiding principle in recasting our law, and insisting that "[e]ven if we do fashion a new world of legal order . . . the principle of legality will not disappear"); Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625 (1988) (urging the importance of "rights" as fallbacks when affective ties collapse—as they sometimes must in any society not deadeningly solitary—and as supports for people who wish to engage in forms of social life that replace, or go beyond, their existing circle of affective connections); West, *supra* note 3, at 65 (endorsing "a community and a judiciary that relies on nurturant, caring, loving, empathic values").

from a care perspective of a number of well-established ethical principles of legal practice. We will begin with the justifiability, in care terms, of the institution of legal representation itself. Once we have established that legal representation can be a caring activity, we will examine what the contours of caring lawyering would be. In particular, we will take up the issues involved in lawyers' choice of cases, in their shaping of the interactions they have with their clients, and in their decisions concerning the degree of zeal with which they will pursue their clients' interests.<sup>35</sup>

In tracing these implications of the ethic of care, I will be arguing that care reasoning does offer guidance for lawyers that applies in a wide variety of settings. To generalize in this way may seem dangerously indifferent to context, and thus inconsistent with the ethic of care's own close attention to the particulars of situations.<sup>36</sup> Moreover, it may seem inconsistent with a proper recognition of how incomplete our current understanding is of the particulars of our lives, and thus of how limited our current grounds are for generalization.<sup>37</sup> Neither of these potential criticisms,

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35. In light of the tremendous attention that Carol Gilligan's work has generated and the intense interest in other feminist inquiries as well, it is somewhat surprising that at least until recently there has been relatively little attention to the dimensions of a feminist approach to legal ethics. Naomi R. Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEGAL ETHICS 23, 26 (1990) [hereinafter Cahn, *Feminist Critique*]. Cahn herself is an exception to this proposition, as *Feminist Critique* reflects; see also Cahn, *supra* note 3 (critiquing the idea of a "female style of lawyering," while exploring the role feminist insights could play in the law practices of men and women). Others exploring these issues include JACK & JACK, *supra* note 3; Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017 (1992); James C. Foster, *Antigones in the Bar: Women Lawyers as Reluctant Adversaries*, 10 LEGAL STUD. F. 287 (1986); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1675-87 (1991); Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987) [hereinafter Menkel-Meadow, *Excluded Voices*]; Menkel-Meadow, *supra* note 3; Kimberly E. O'Leary, *Creating Partnerships: Using Feminist Techniques to Enhance the Attorney-Client Relationship*, 16 LEGAL STUD. F. 207 (1992); Ann Shalleck, *The Feminist Transformation of Lawyering: A Response to Naomi Cahn*, 43 HASTINGS L.J. 1071 (1992); Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1 (1993); Spiegelman, *supra* note 9; Jane Spinak, *Reflections on a Case (of Motherhood)*, Paper Presented at the Clinical Theory Workshop, Columbia Law School (Mar. 27, 1992) (unpublished manuscript, on file with *The Georgetown Law Journal*); see also Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) (bringing critical theory, rooted in part in feminist thinking, to bear on the lawyer-client relationship); Bartlett, *supra* note 33 (exploring many questions relevant to a caring ethic for lawyers, though not addressing herself to questions of legal ethics as such).

36. See *supra* text accompanying notes 4-13.

37. See Shalleck, *supra* note 35, at 1078-79 (urging analysis of "our particular experiences as lawyers and our understanding of those experiences" as "the essential place for beginning" to "identify[] a feminist lawyering process"; through this analysis, "we might discover aspects of the attributes of the ethic of care. But we will see them in their concrete particularity. We will find ambiguity and complexity."). Feminists have repeatedly empha-

however, seems to me to be cogent here. As we will see, the generalizations that the ethic of care supports are not inflexible rules; such rules would be surprising outgrowths of so contextual a moral framework. Instead, these generalizations will provide multifactored guidelines, concrete enough to provide real guidance for lawyers' thinking but by their very character capacious enough to accommodate the caring lawyer's assessment of the complex particularities of her own ethical problems. Because of that internal flexibility, I believe these guidelines can inform lawyers' practice not only in such contexts as family law or criminal defense but also in a range of seemingly less personal settings, such as class action representation and corporate practice. Even so, I recognize that these generalizations may be wrong, and I welcome readers' evaluation and critical appraisal. Without such efforts at generalization, however, it seems to me that no effort to appraise the particulars of lawyers' work can ultimately be successful, for data and theory relentlessly interact in our efforts at understanding. I offer this effort, then, as theorizing in terms of the ethic of care as a complement rather than as a substitute for a scholarship of the particular.

## II. THE JUSTIFICATION OF LEGAL REPRESENTATION—OF CARING MORE FOR CLIENTS THAN FOR OTHERS.

For whom should the caring lawyer care? One answer to this question might be that the caring lawyer—that is, the lawyer for whom considerations of care are central to moral judgment—should care for everyone involved in a situation. This answer is entirely consistent with Gilligan's account of the approach Amy takes to the dilemma of "Heinz and the druggist." Faced with a situation in which a druggist is charging so high a price for a life-saving drug that Heinz's wife will die if the price must be paid, Amy urges that the druggist and Heinz discuss the matter together. Amy sees Heinz and the druggist as people in connection, and she seeks to bring the druggist to recognize their connection.<sup>38</sup> She does not choose to punish the druggist for his or her past indifference to this connection; instead, the druggist also is apparently entitled to the care implied in seeking to rebuild connection rather than in seeking to override the druggist's wishes through theft. Generalized, Amy's response could suggest that everyone in a situation is entitled to the lawyer's care, regardless

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sized the danger of losing the particularity and reality of experience in over-eager generalization—even generalization from a feminist perspective. See, e.g., Harris, *supra* note 33; Judy Scales-Trent, *Women in the Lawyering Process: The Complications of Categories*, 35 N.Y.L. SCH. L. REV. 337 (1990); Elizabeth V. Spelman, *Deceptive Dichotomies*, 35 N.Y.L. SCH. L. REV. 343 (1990).

38. GILLIGAN, *supra* note 1, at 28-29.



of how uncaringly he or she may be acting. The next step—a discussion of which I will postpone for a moment—would be to say that everyone is also entitled to *equal* care from the lawyer.

Gilligan seems to believe that the ethic of care generates a caring attitude towards everyone. She writes, for example, that “an ethic of care rests on the premise of nonviolence—that *no one* should be hurt.”<sup>39</sup> Similarly, Robin West, in her account of “cultural feminism,” sees the caring qualities of women as the source of a caring approach to all of human life.<sup>40</sup> She and others find this caring stance exemplified in the care given by mothers to their children, but they maintain that women’s care is not merely for their own children, but for all children and all people everywhere.<sup>41</sup>

The idea that everyone is entitled to the lawyer’s care is problematic within the framework of care, however, because it is so universalistic and so indifferent to context.<sup>42</sup> If everyone is entitled to the lawyer’s care, this must be because lawyers have an obligation to care that is completely indifferent to the actual personalities or behaviors of the people to whom the obligation is owed. The lawyer must care for every member of the community, each person in the web of interconnection, including those people who have manifested indifference or antagonism toward this very idea of mutual responsibility—manifested it, perhaps, by frauds, or crimes, or simple lack of caring for their fellow community members. To say that the lawyer should care for everyone regardless of character or conduct is rather like saying that everyone is entitled to exercise his or her legal rights regardless of character or other conduct—a quintessential claim of rights morality.

Even if Gilligan and others are correct that an ethic of care extends care to everyone, it is surely not the case that those who follow an ethic of care

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39. *Id.* at 174 (emphasis added); see also *supra* notes 29-30 and accompanying text (Gilligan’s identification of broad ethical ideals).

40. West, *supra* note 3, at 14-28.

41. See Ruddick, *supra* note 16, at 226; Resnik, *supra* note 22, at 1916-19 (describing and evaluating Ruddick’s work on “maternal thinking”). For a sharp exchange on the merits of the “mothering” idea, see Pollitt, *supra* note 3, at 802-03; *Exchange: Sisters Under the Skin*, NATION, Mar. 8, 1993, at 290. For reflection on the connection between mothering and teaching, see Kathleen Sullivan, Self-Disclosure, Separation, and Students: Intimacy in the Clinical Relationship 43-47, Paper Presented at the Clinical Theory Workshop, Columbia Law School (Mar. 8, 1991) (unpublished manuscript, on file with *The Georgetown Law Journal*).

42. Lawrence A. Blum notes that Gilligan means the “web [of ongoing relationships] to encompass all human beings and not only one’s circle of acquaintances. But how this extension to all persons is to be accomplished is not made clear in her writings, and much of Gilligan’s empirical work is centered on the domain of personal relations and acquaintances.” Blum, *supra* note 34, at 473. In contrast to Gilligan, Nel Noddings is emphatic in rejecting the possibility of “caring for” everyone. Indeed, she goes so far as to say that the caring person will “dread” the arrival of the stranger needing her care, precisely because true care can be so demanding for the person caring, NODDINGS, *supra* note 3, at 47, 86, 112.

must care for all people *equally*. The ethic of care is a contextual form of moral judgment, in which the actor seeks to discern her moral responsibilities through a detailed understanding of the situation in which she finds herself. "Equal care for all" is a demand that is on its face indifferent to context.

Moreover, the notion of equal care for all is psychologically implausible. Ordinary people, women and men, do not feel equal care for all. Saints may offer such love to all, but the ethic of care is not an ethic of saints. On the contrary, Gilligan is at pains to chart the path of maturation in care reasoning, a path on which women come to see themselves as proper objects of their own care and so to reject an equation of responsibility with selflessness.<sup>43</sup> Ordinary people are not selfless, nor do they view all those with whom they come into contact with equal amounts of care. On the contrary, we care for our family and for our friends more than we care for strangers and those whom we dislike, to say nothing of our enemies. The classic, indeed stereotypical, example of the inequality of caring feelings is an example of particular relevance to a feminist ethic of care—a mother's care for her children, a feeling that hardly conforms to a notion that caring people care for all others equally.

More prosaically, the ability to feel another's experience as if it were one's own—to empathize—is very much a part of caring,<sup>44</sup> and we do not empathize equally with everyone. Instead, empathy seems to be decidedly parochial; we empathize most with those most like us.<sup>45</sup> Presumably we also empathize more with those whom we know better, and so with those with whom we have had longer, and closer, associations.

What is true for people in general should be true for lawyers in particular: caring lawyers, like other caring people, need not care equally for all involved in any given situation. This proposition is important because it allows us to conclude that the idea, that lawyers should have clients to whom they owe special responsibilities, is consistent with the ethic of care. If responsibilities are derived from care, and if care is greater towards

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43. GILLIGAN, *supra* note 1, at 73-74.

44. Blum, *supra* note 34, at 485-86. For further explication of the meaning and elements of empathy, see Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991, 991-93 (1992); Lynne H. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1578-87 (1987).

45. Martin L. Hoffman, *Empathy, Its Limitations, and Its Role in a Comprehensive Moral Theory*, in MORALITY, MORAL BEHAVIOR, AND MORAL DEVELOPMENT 283, 297 (William M. Kurtines & Jacob L. Gewirtz eds., 1984); Henderson, *supra* note 44, at 1584; Massaro, *supra* note 19, at 2101-02, 2121-22; cf. Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 734-39 (1987) (discussing potentially false and manipulative character of lawyers' expressions of empathy). There is evidence that we can learn to empathize better, Henderson, *supra* note 44, at 1583 & n.52 (citing S. NATALE, AN EXPERIMENT IN EMPATHY (1972)), and this is heartening, but it hardly undercuts the recognition that we do not empathize equally with all.

some than towards others, then caring people have greater responsibilities towards some than towards others. If so, then caring lawyers can represent particular clients, to whom these lawyers will acknowledge greater responsibilities than they owe to anyone else in a situation. As long as the measure of the responsibilities imposed by the law governing the lawyer-client relationship does not exceed what can be justified by considerations of care, the attorney-client relationship is consistent with the ethic of care. It remains to be seen, however, which potential clients a caring lawyer should represent, how she should act towards those she accepts as clients, and how she should act on her clients' behalf.

### III. WHICH CLIENTS SHOULD A CARING LAWYER REPRESENT?

If the appropriateness of entering into lawyer-client relations rests on the consistency of those relations with the responsibilities of care, the choice of clients should also be consistent with those responsibilities. Hence, the caring lawyer should not represent someone for whom care does not justify, or permit, taking on responsibility. Moreover, it follows that lawyers should not decline those cases in which care does call for them to take on responsibility. It might be thought, then, that the freedom lawyers currently enjoy, to take on any case they can competently handle—or reject it—must entirely fall away if care becomes the central consideration in lawyers' ethics.<sup>46</sup> Perhaps surprisingly, however, this inference is mistaken. As we will see, the ethic of care recognizes the lawyer herself as a proper object of her own care, and thus permits her to take or reject cases when, if her own interests were ignored, care would call for a different course of action. Yet, it would also be mistaken to assume that the ethic of care leaves lawyers wholly free to pick and choose among potential cases. Unless care for herself justifies her advancing an uncaring cause, we will find, the responsibilities of care will significantly guide the lawyer's choices of clients and causes to represent.<sup>47</sup>

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46. On lawyers' current discretion to accept or reject cases, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26 (1981) [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1983) [hereinafter MODEL RULES].

47. This guidance will not, however, be in the form of ironclad rules. It would be surprising if the ethic of care were to impose many ironclad rules, for such rules are, by definition, indifferent to context, a stance the ethic of care rejects. The contents of a code of caring legal ethics would be likely, therefore, to consist much more of guidance and discretionary standards than of inflexible rules. Probably the enforcement process would also emphasize conciliation and the deepening of mutual understanding, when possible, in preference to trials and the imposition of sanctions. See Menkel-Meadow, *supra* note 3, at 52-55 (suggesting that caring lawyers might "change the adversarial system into a more cooperative, less war-like system of communication between disputants in which solutions are mutually agreed upon rather than dictated by an outsider, won by the victor, and imposed upon the loser"). But see Resnik, *supra* note 22, at 1940-44 (questioning the desirability of many forms of alternative dispute resolution, and urging feminists not to

To understand the extent to which the ethic of care would permit the lawyer to take her own interests into account, we must consider an aspect of Gilligan's explication of the ethic of care that has received less attention than other elements of her work: her account of women's moral decisions about abortion. Based on interviews with twenty-nine women in the first trimester of their pregnancies, as well as on follow-up interviews conducted approximately a year later, Gilligan's "abortion decision study" illuminates the process by which some caring women decided to abort their pregnancies.<sup>48</sup> The women Gilligan studied did not necessarily take the view, adopted by the United States Supreme Court in *Roe v. Wade*,<sup>49</sup> that fetuses were not "persons" and therefore had no constitutional rights—or, in care terms, were not entitled to consideration in weighing the obligations of care. Instead, it appears that in some cases women chose abortions despite seeing their fetuses as unborn children for whom they *did* care.<sup>50</sup>

Caring for their unborn children, these women nevertheless terminated their pregnancies. How they reached this decision no doubt varied from woman to woman. Some may have understood their decision as based only on care for the unborn baby, who might face a difficult life if brought into the world, for example because mother and child would be mired in poverty. But Gilligan hears in the words of the women she studies evi-

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reject but rather to transform the institution of judging). I will return to the question of caring ethical process below. See *infra* notes 170-172 and accompanying text.

48. See GILLIGAN, *supra* note 1, at 3. At least twenty-one of the twenty-nine women interviewed ultimately chose to have abortions. *Id.* at 72.

49. 410 U.S. 113 (1973). Gilligan herself first called my attention to the contrast between care's approach and *Roe*'s.

50. GILLIGAN, *supra* note 1, at 118. Here Gilligan described the judgment made by a woman named Sarah, who faced the issue of whether to have an abortion. Gilligan writes:

The ultimate choice is abortion: "How can you take responsibility for taking a life?" but also how can you bring a child into the world in order to "assuage your guilt?" The "turning point" for Sarah comes in the realization that in this situation there is no way of acting that avoids hurt to others as well as to herself, and in this sense, no choice that is "right." Seeing no resolution that does not leave conflict, no way of acting that does not exclude, she finds in the constraint of this dilemma the limits of her previous mode of thought. Thus Sarah reconsiders the opposition between selfishness and responsibility, realizing that this opposition fails to represent the truth of the connection between the [unborn] child and herself.

*Id.* (emphasis added). Gilligan does not spell out how common Sarah's view of the abortion decision was, nor whether any other participants in the study held such views and nonetheless chose to have abortions. Her discussion strongly implies, however, that at least one other woman did choose to have an abortion despite seeing her fetus as a human life; see *id.* at 83-85 (Janet). She also specifically discusses at least three other women in the study who apparently saw abortion as taking life; see *id.* at 81 (Denise), at 85 (Sandra), at 88 (Ellen); see also *id.* at 58-59 (similar views from Clair, a woman in another of Gilligan's studies). It seems reasonable to infer that some of the other women who decided to have abortions shared Sarah's understanding of the choice before them.

dence of "a sequence in the development of the ethic of care," whose highest stage entails more care for the self than an exclusive focus on the unborn baby would allow. In this three-stage sequence, "an initial focus on caring for the self" gives way to a second stage, in which "the good is equated with caring for others." But the highest stage of care reasoning rejects this "inequality between other and self," and from a recognition that "self and other are interdependent" draws the conclusion that both are the proper objects of care.<sup>51</sup> At this most mature stage of care reasoning, the caring person recognizes herself as one of the legitimate objects of her care, and weighs her needs in the balance with those of others.<sup>52</sup> On the basis of her own needs, then, a caring person—a person who wishes to avoid hurting others when possible—will sometimes, deliberately, hurt them.<sup>53</sup> Such hurt is sometimes unavoidable; to try to deny that, as Gilligan rightly argues, is not so much caring as it is immature.<sup>54</sup>

This understanding of mature care reasoning implies that the caring lawyer is also a proper object of her own care. Perhaps this lawyer needs to pay debts, or to cover the cost of educating her children. Perhaps she hopes for a decisive step forward in her career, or fears the retribution of uncaring superiors at her law firm. She can properly weigh these needs and responsibilities in deciding whether to undertake a representation that would otherwise not be sustainable on the basis of care, or in deciding whether to pass up a case that would be valuable in care terms. A lawyer faced with sufficiently demanding responsibilities in other facets of her life could even vigorously represent a client whom she believed to be engaged in deeply harmful and uncaring activities. In these circumstances, the difference between her and a lawyer who simply maintained that his choice of clients presented no moral questions, so long as what he did for his clients was lawful, is precisely that the caring lawyer would see a moral conflict and would recognize and regret—though she would also accept—

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51. *Id.* at 74. Nel Noddings agrees with Gilligan that the caring person (in Noddings' terms, the "one-caring") can properly care for herself. Her justification seems to rest on the more selfless grounds than Gilligan might accept, however, for Noddings argues that the one-caring cares for herself because she otherwise will lose her ability to care for others. NODDINGS, *supra* note 3, at 99-100.

52. See *supra* note 50 (Gilligan's account of Sarah's decision to have an abortion). The tenor of Gilligan's discussion reflects that she approved of Sarah's newfound capacity to care for herself as well as for others, and to decide on actions that may indeed, however regrettably, inflict hurt on others. Mary Ann O'Loughlin makes a similar observation in the course of a sharp—and to my mind unfair—attack on what she sees as the discriminatory implications of Gilligan's focus on women's taking responsibility for abortion decisions. See Mary Ann O'Loughlin, *Responsibility and Moral Maturity in the Control of Fertility—or, A Woman's Place Is in the Wrong*, 50 SOC. RES. 556, 563 (1983).

53. For an illustration, see the case of Janet, described in GILLIGAN, *supra* note 1, at 84-85.

54. See *id.* at 74.

the moral cost involved in meeting one caring responsibility while failing to meet another.<sup>55</sup>

Although the ethic of care thus imposes no hard and fast rules for choosing clients, this ethic does affect the lawyer's choices. As the analysis just presented suggests, the lawyer may take on a case in which her victory would advance a cause that denies connection and responsibility—one that is, in a word, uncaring—but she will only do so when other considerations of care justify this decision. Put more affirmatively, the ethic of care indicates that the lawyer should seek to shape a legal practice in which her actions will further the caring values she endorses. Unless care for herself justifies her taking a different course, she should seek to vindicate the ethic of care in the choices she makes of clients and causes to represent.

As we will see, vindicating the ethic of care in the choice of clients entails the lawyer's taking account of at least three features of the case she is considering, the import of which will sometimes coincide but sometimes conflict. First, the lawyer will want to consider the extent of client need, for caring lawyers will seek to respond to need when they recognize it. Second, she will want to listen to her own feelings of care for her potential client (or her lack of them), not only because her feelings can affect the quality of her work but also, and perhaps more fundamentally, because actually caring is part of honoring the ethic of care. Third, she will look to the caring, or uncaring, quality of her client and of the tasks he wishes her to perform, for helping another to act uncaringly is a blow to the values of care.

Perhaps the first of these factors, however, makes the others irrelevant. It might be argued that vindicating the ethic of care imposes no restriction on the choice of clients or cases at all, because the caring lawyer will see a moral connection in expressing care in every lawyer-client relationship she forms. As a psychological assertion, this suggestion has a measure of truth

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55. See JACK & JACK, *supra* note 3, at 110-20 (describing lawyers who remain sensitive to their own moral principles, while also seeking to meet the differing moral obligations imposed on them as lawyers, and who as a result "recogni[ze] . . . moral cost"). Although the discussion in this text suggests that such decisions may be isolated incidents in a career largely devoted to caring work, there may be quite a few lawyers who do not have the opportunity to shape a practice that offers them substantial opportunity for the expression of care. These lawyers' work may not be actively inimical to caring concerns, but rather may involve workaday litigation or transactions in which emotion (and intellect) may have little room to flourish. Such jobs may exist, but we should not assume that care is a luxury for the public-spirited or the rich. There may be many circumstances, even in seemingly routine practices, in which lawyers deal with clients, adversaries, counsel, and others to whom they can act in valuable and caring ways. In this regard, it is noteworthy that Jack and Jack derived their data from the study of lawyers in one county in Washington; the lawyers they studied did a variety of work, and their account does not suggest that the caring lawyers they met occupied any specially privileged niches in this relatively small community's legal profession.

to it. Lawyers and clients *are* thrown together by the client need that generates the relationship. From this more or less intimate encounter can come strong feelings, particularly from the client for his lawyer, on whom the client may be dependent for emotional sustenance and legal aid, in contexts ranging from criminal defense to estate planning. The lawyer who decides to represent a client may be unable to avoid such client need; by moral disposition, the caring lawyer will not be inclined to avoid it, for she will acknowledge a responsibility to meet needs that she has helped to generate, and her contact with the client will make her especially aware of his particular set of needs. With clients in such need, in short, the lawyer will have reason to feel that her response to her clients is itself a caring act—regardless of how little her clients' aspirations or personalities themselves embody caring values. Like Charles Fried's "lawyer as friend," the "lawyer as caregiver," on this account, acts morally no matter whom she chooses to support with her representation and her care.<sup>56</sup>

But the lawyer as caregiver does not inhabit precisely the same moral universe as Fried's lawyer as friend. Many clients need their lawyers' personal support—but not all. Some clients may need no personal sustenance from their lawyers, because they use the lawyers' services for entirely routine and unemotional transactions or projects;<sup>57</sup> many probably need only limited emotional connection. Rather than being dependent on their lawyers, moreover, some clients may wield such power or act with such insistence that they dominate and intimidate their legal agents. The caring lawyer would no doubt acknowledge that even these clients may "need" her legal services, but she will not see in her relationship with them the same intensity of connection as she will find with clients who in fact look to her to satisfy a wider and more personal range of needs.<sup>58</sup> She also will not be indifferent to the likelihood that such commanding clients have only limited need even for her legal services—unless those services are somehow unique—because they will often (though not always) be well able to afford alternative counsel. By contrast, she will properly be responsive to the needs of some clients whom she does not ever expect even to meet—such as the members of a class of mentally retarded people, few of

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56. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1074-75 (1976).

57. An example might be the finance company Fried imagines, engaged in a routine foreclosure "on the widow's refrigerator," when "the case means no more to the finance company than the resale value of one more used refrigerator." *Id.* at 1085.

58. I do not mean to suggest, however, that only powerless clients trigger emotional connection with their lawyers. As my colleague Michael Sinclair has emphasized to me, a lawyer in corporate practice may have many opportunities to develop strong personal connections with the men and women of the corporation with whom she deals, and may find in such a practice many occasions when friendship and client needs create strong grounds for care. See *infra* note 162.

whom she will personally encounter, but all of whom she may believe need her legal assistance urgently. Need comes in many guises, but the caring lawyer will, and should, seek to represent those who need her most.<sup>59</sup>

Important as it is, though, client need is not the only criterion on which caring lawyers should choose their clients. We do not always care for those who need us; sometimes we find their need frightening or simply unappealing. A child molester, for example, may feel ashamed of his crime and terrified at the thought of imprisonment, and yet some lawyers' sympathetic identification with the molester's victim or with the victim's parents may preclude their actually experiencing much care for the molester. This possibility is already recognized in existing principles of legal ethics, especially in those cases when the lawyer's revulsion is so acute that it may impair her ability to effectively carry out the representation.<sup>60</sup>

For the caring lawyer, however, the significance of her personal inability to care may echo particularly widely. She may believe that an inability to care impairs her representation in ways that a different attorney might discount, but that for her are nonetheless troubling. For example, she may fear that her inability to care will interfere with her ability to offer her client the empathetic responses that might win her client's trust and cooperation, and so enable her to provide him with effective and committed representation.<sup>61</sup>

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59. In gauging need, she inevitably will rely in part on her own predispositions about the intensity of need or suffering that some people experience as compared to others. She may feel, for example, that rape victims are more likely to need help than rape defendants, or she may feel the opposite. Judgments of this sort will not necessarily be sound, even as generalizations, for some may be based on nothing more than bias. Yet, it seems entirely appropriate for lawyers to choose areas of practice partly on the basis of their sense, imperfect as it will be, of the usual character of the work it will involve. But even the lawyer convinced of the validity of her preconceptions, and even the lawyer who has chosen a field of practice based on them, should not automatically assume their validity in all circumstances. A dedicated advocate of the rights of victims of sexual violence, for instance, should not deny the possibility that a particular rape defendant is more needy than his alleged, or even actual, victim. The ethic of care calls for contextual analysis and eschews abstractions, and in context it may turn out that the need of the particular defendant now before the lawyer justifies her representing him, despite her sense of the general distribution of pain in cases like this one.

60. MODEL CODE, *supra* note 46, EC 2-30. The Model Rules allow lawyers to reject cases that they consider "repugnant," even without any judgment that their sense of repugnance would prevent them from effectively handling the work. MODEL RULES, *supra* note 46, Rule 6.2 cmt.

61. Cf. Ellmann, *supra* note 45, at 735 (arguing that lawyers are often likely to have less than wholly empathetic responses to their clients). The lawyer with such a response will be concerned about the quality of her representation if she believes that she is unable to express empathy that she does not entirely feel, or if she is unwilling to mimic care in this fashion. I suspect, however, that many lawyers who do value considerations of care are prepared to express empathy in such circumstances, and even to express it in a way that their clients accept as sincere. See *id.* at 736-37. But see William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 135.



From the perspective of the ethic of care, moreover, the fact that the lawyer cares little for the client will still argue against her taking the case, even if she believes that her ability to handle it is entirely unimpaired. To be sure, one may claim that the lawyer's personal disaffection for a potential client is irrelevant in assessing how acute the client's needs are and thus how caring an act the representation of this person will be. But the ethic of care, as Gilligan describes it, is chary of abstractions, and it is a drastic abstraction from concrete context to find care equally expressed in opposite situations: in a representation that on the lawyer's part is unfeeling, and in another representation in which the lawyer feels her own deepest sympathies engaged. Actually caring is part of honoring the value of care.<sup>62</sup> For this reason, the caring lawyer will consider not only the would-be client's need, but also the nature of her own response to that need, in deciding which cases to take.

The nature of the lawyer's response is important in itself, but I do not mean to suggest that the caring lawyer will automatically accept her own responses as definitive. On the contrary, she will need to consider whether her own responses comport with her commitment to an ethic of care. If she feels that her initial failure to care for a potential client is the product of bias on her part, she may be obliged to try to overcome this failing, and to recapture within herself an aspect of care that she has lost. If she cannot succeed, she may recognize, regretfully, that she cannot yet fully express care in this potential case. Her assessment of her own responses, however, may lead to quite different conclusions. In particular, she may come to feel that the reason she does not care for a particular person is that what he is or what he seeks is itself uncaring.<sup>63</sup>

The conclusion that the would-be client does not honor the ethic of care would provide a further reason for rejecting his case—indeed, a reason

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62. Flanagan and Jackson observe that "where friendship or love truly exists, thinking about what one is obligated to do can, as Bernard Williams has put it in a related context, involve 'one thought too many.'" Flanagan & Jackson, *supra* note 19, at 79 (quoting BERNARD WILLIAMS, *MORAL LUCK* 18 (1981)). More formally, Lawrence Blum writes that "while I can, out of adherence to a principle of aiding friends, do something to aid my friend, that action will not have entirely fulfilled what a fuller notion of friendship bids of me, which is to perform the action of aiding as an action expressing my care for my friend." Blum, *supra* note 34, at 490. So, too, Nel Noddings places particularly great weight on the emotional content of the caring relationship. See NODDINGS, *supra* note 3, at 30, 68 (arguing that "[c]aring involves, for the one-caring, a 'feeling with' the other," and also entails "the perception by the cared-for [person] of an attitude of caring on the part of the one-caring").

63. "What he is" and "what he seeks" are not necessarily the same. Caring people may want uncaring action taken on their behalf, as in the example of the remorseful rapist; see *infra* note 66 and accompanying text. Conversely, uncaring people may have objectives that coincide with what care would urge, as in the case of the friend who offers aid to his friend, but out of a sense of duty rather than affection.

that would weigh in the lawyer's thinking even if she found that she did care for this uncaring client.<sup>64</sup> Consider again a familiar, and familiarly troubling, example: representing a guilty rapist at his trial. Suppose that this potential client confesses his guilt to his lawyer, but makes clear that he wants her to cross-examine the victim ruthlessly in order to make her truthful accusations look like lies.<sup>65</sup> The lawyer senses real terror under the client's bravado and recognizes that in some parts of his life this man does act in a caring fashion. At the same time, however, she judges him to be without remorse for his act of rape and as indifferent to his victim's potential suffering in court as he was to her suffering during the crime itself. This lawyer should acknowledge that her potential client has acted uncaringly (to put the point gently), and that he now wishes her to assist him in legal strategy that will amount to a further uncaring act. To assist a person in denying connection does not honor connection, and so the lawyer should take her client's lack of care as a reason not to take his case.<sup>66</sup>

As I have outlined it, the caring lawyer's discretion to reject cases remains substantial, as it is under current rules of legal ethics, but is far from unlimited. The complex set of factors traceable to the responsibility generated by care may produce a clear answer in a given case, or it may point in conflicting directions and generate a painfully ambiguous choice for the lawyer. What is clear is that the caring lawyer should choose in light of the considerations of care. This moral obligation stands in striking contrast to two notable accounts of lawyers' duties in the choice of cases—the virtually untrammelled prerogative to take or reject any case, a liberty that Charles Fried endorses, and the duty to select cases in light of their contribution to justice, an obligation that William Simon advocates.

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64. In speaking of clients who do not "honor the ethic of care," I do not mean to suggest that a caring lawyer will focus primarily on whether or not the client believes the ethic of care is a valid moral framework. Whether clients are caring, and whether their objectives are caring, will often have little to do with the clients' views of moral theory.

65. This is a well-known problem, which has been the focus of considerable discussion. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 150-52 (1988); Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 154-57 (1990) (reviewing LUBAN, *supra*).

66. The case would be somewhat different if the client wanted the lawyer to carry out the cross-examination because he was terrified of prison, but was also remorseful about the crime and about the damage the cross-examination would do to the victim. Here the client is not uncaring, but his objectives still involve harm to a person who does not deserve to be harmed. A caring lawyer might well find even the prospect of inflicting this hurt a ground for rejecting the case; at the same time, she might more easily find other considerations of care, such as her client's need and perhaps her empathetic response to his remorse, sufficient grounds for taking the case after all. For a vigorous argument in favor of criminal defense work as an expression of a lawyer's care, see Smith, *supra* note 35, at 45-50.

For Charles Fried, the lawyer's personal autonomy justifies her selecting any clients she wishes, for almost any reason she wishes, as long as she then faithfully carries out her task of securing her clients' autonomy within the law.<sup>67</sup> Fried maintains that to command the lawyer to offer her services where they are most needed is to transform her into a mere resource for others and to deny her human prerogative to offer her commitment and talent where she wishes.<sup>68</sup> In contrast, the ethic of care denies lawyers such unbounded discretion, and, by identifying considerations that should guide lawyers' choice, indicates that it is the good lawyer who should be more disposed to take some cases than to take others. Indeed, the ethic of care leaves little room for the contention that every case is of moral value. The caring lawyer who, without any pressing need of her own, decides to represent a client for whom she does not care in an enterprise that she judges uncaring, when that client could obtain equally effective alternative counsel, is not doing a good thing at all in care terms.

The caring lawyer's ethical constraints, however, do not stem from the view Fried warns against—that she is a resource to be distributed and used for others. This is so in two senses. First, her obligation to act in accordance with care is simply an expression of her own morality; Fried in no way criticizes those lawyers who happen to have such convictions and act upon them. Second, and more importantly, the ethic of care rests on a perception of human lives as interconnected and mutually responsible, whereas Fried's view is that the touchstone of morality must be the

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67. Fried, *supra* note 56, at 1068-78.

68. Interestingly, Fried accepts one limit on the lawyer's prerogative to reject any case, for he maintains that a lawyer can sometimes properly be required to take on a case when the client "cannot otherwise find counsel." *Id.* at 1078-79. Fried accepts this restriction on lawyers' liberty on the ground that it would not be a frequent imposition and that it operates to secure the moral foundation of the legal system, namely the system's promise to provide everyone with protection for his or her autonomy within the law. (He also would insist that the lawyer be paid for his or her work.) *Id.* at 1079. The ethic of care, by contrast, might not call on lawyers to take such cases. The need of the potential client would certainly be a factor pressing the lawyer to undertake representation, but it might well be that other care-related factors would outweigh this one. The caring lawyer has more of a responsibility to respond to need than Fried acknowledges in general, but, it would seem, less of an obligation than Fried would impose to respond to the particular need generated when she is "the last lawyer in town."

It is difficult to say whether this aspect of care thinking would actually mean that some people now able to get counsel would become unable to do so, since some caring lawyers might decide to take cases they consider uncaring out of care for themselves. *See supra* notes 46-55 and accompanying text. It is also difficult to say whether, if some clients did find themselves unable to obtain counsel, the net result would be more morally troubling than the maldistribution of legal services that we live with today. But the possibility of real injustice resulting from the discretion the ethic of care offers lawyers to withhold their services does suggest the continued need for the notion of a "right" to counsel, even in a world in which care became central.

recognition of each individual as a "responsible, valuable, and valuing agent."<sup>69</sup> These two views are not absolutely contradictory, but they *are* different. The ethic of care denies that adhering to the responsibilities of care turns the lawyer into a resource, because care rejects the understanding of human autonomy that Fried embraces. For Fried, human interconnection is important but it is almost entirely a matter of autonomous choice. For those who accept the ethic of care, autonomous choice only takes place within an existing web of connections; that choice may sometimes justifiably rupture the web, but it can never simply ignore the web. Acting with care, then, is not a form of enslavement, but rather a recognition of one's humanity.<sup>70</sup>

It may not be surprising that the ethic of care is inconsistent with the embrace of autonomy in Fried's vision of lawyering. It is more startling, however, to realize that the ethic of care is also somewhat inconsistent with the model of lawyers' obligations advanced by a leading critical ethics scholar, William Simon.<sup>71</sup> Yet the central maxim of the ethical discretion for which Simon argues, namely that "[t]he lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice,"<sup>72</sup> plainly does not "sound in" the language of care. The contrast persists when Simon later explains this maxim by suggesting that "[i]n deciding whether to commit herself to a client's claims and goals, a lawyer should assess their merits in relation to the merits of the claims and goals of others whom she might serve." More specifically, she should consider "the extent to which the claims and goals are grounded in the law, the importance of the interests involved, and the

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69. Fried, *supra* note 56, at 1069.

70. See NODDINGS, *supra* note 3, at 99 ("Since I am defined in relation, I do not sacrifice myself when I move toward the other as one-caring."). Catharine MacKinnon's appraisal of the "different voice," however, might be read to characterize the ethic of care as a framework that collaborates with a male-dominated society's use of women as resources. She has argued that "[w]e may or may not speak in a different voice—I think that the voice that we have been said to speak in is in fact in large part the 'feminine' voice, the voice of the victim speaking without consciousness. . . . It makes a lot of sense that we should want to urge values of care, because it is what we have been valued for. We have had little choice but to be valued this way." *Feminist Discourse*, *supra* note 3, at 27. Gilligan maintains, however, that women who attain a mature understanding of care, in which they recognize themselves as among the proper objects of their own care, both acquire greater control over their own emotional lives and come "into conflict with current societal arrangements." Gilligan, *Reply*, *supra* note 3, at 332. In short, understanding the ethic of care is liberating rather than enslaving for women.

71. Naomi Cahn has drawn a similar contrast between the case-selection criteria of William Simon and others, on the one hand, and those criteria that a lawyer committed to "feminist connection" would adopt, on the other. Cahn, *supra* note 3, at 1064-65.

72. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1085, 1090 (1987).

extent to which the representation would contribute to the equalization of access to the legal system.”<sup>73</sup>

The considerations to which Simon points overlap in some respects with those a caring lawyer would consider, but they are by no means identical. Perhaps the point of greatest coincidence is Simon's focus on equalization of access to the legal system. This factor can readily be translated into care terms, as a call for responsiveness to potential clients' relative needs for legal services. Whether the potential client's claims and goals are well grounded in the law, on the other hand, often will be only tangentially related to the caring lawyer's assessment of the caring, or uncaring, quality of the client's objectives. None of Simon's factors, moreover, directly responds to the caring lawyer's concern to represent clients for whom she actually, personally, cares, nor to her desire to represent those clients who are likely to need her most, not just in legal terms (which Simon's "importance" criterion might capture) but also in personal ones. The judgments that Simon's lawyers would form about which cases to take seem more impersonal, more focused on justice and rights, and less emotionally responsive and attentive to need, than those that the caring lawyer would feel a responsibility to make.<sup>74</sup>

The contrasting implications of the ethic of care and of ethical discretion underline the significance, and the value, of applying the ethic of care

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73. *Id.* at 1093.

74. One implication of this contrast is that caring lawyers may be less likely than Simon's attorneys to take cases for the sake of "the cause" as opposed to "the clients." I have already argued that caring lawyers can recognize and respond to the need of people whom they never meet, see *supra* text accompanying note 59, and I do not mean to suggest that corporate practice (to the extent this work is understood as a representation of the normally faceless stockholders), or public interest law (to the extent this form of lawyering pursues legal reform rather than particular clients' interests), or class actions (to the extent these cases do not really entail the class counsel's direct involvement with class members) would disappear in a world of caring lawyers. Cf. Joan C. Tronto, *Women and Caring: What Can Feminists Learn About Morality from Caring?*, in *GENDER/BODY/KNOWLEDGE: FEMINIST RECONSTRUCTIONS OF BEING AND KNOWING* 172, 182-84 (Alison M. Jaggar & Susan R. Bordo eds., 1989) (criticizing the idea that care should be confined to particular people with whom one is directly involved, and arguing that "[a] feminist approach to caring . . . needs to begin by broadening our understanding of what caring for others means . . . in terms of the need to restructure broader social and political institutions if caring for others is to be made a more central part of the everyday lives of everyone in society"). For a contrasting view, to which Tronto is responding, see NODDINGS, *supra* note 3, at 90 (maintaining that a retreat from concrete caring for particular human beings to a focus on "humanity-at-large" amounts to a "virtual shatter[ing]" of the caring person's "ethical ideal").

Nonetheless, I believe it is true that caring lawyers will be *less* disposed to pursue "cause lawyering" than Simon's lawyers would be. The breadth of need in these cases will weigh in favor of taking them, for a caring lawyer as well as for a lawyer exercising Simon's ethical discretion. But to the extent that such lawyering limits the caring lawyer's opportunity to care personally for her clients and to respond to the clients' personal need for connection with the lawyer, the caring lawyer will view the grounds for taking these cases as diminished.

to the issue of lawyers' choice of cases. Although this ethic insists on the appropriateness of lawyers' taking their own interests into account, it declines to derive from that proposition an unlimited license for lawyers to pick and choose cases as they wish. Instead, the ethic of care guides lawyers to a consideration of client need, the lawyers' own feelings, and the caring or uncaring quality of the client and his cause. I doubt that these guidelines, if generally accepted, would radically alter the current distribution of legal services, a distribution rooted not only in ethics but also, and perhaps primarily, in broad social and economic forces shaping our lives. But these guidelines would alter lawyers' *deliberations* about case selection substantially, and I suggest the result would be a modest, but welcome and real, increase in the social responsibility of lawyers' case selection decisions. Moreover, these guidelines would shape that turn to social responsibility in a somewhat different, more personal way than William Simon's proposals would. Although I suspect the two sets of reforms could fruitfully be melded together, the ethic of care rightly underscores the need for reforms in legal practice to reflect concrete need and connection as well as abstract principle. We must now see whether the ethic of care has comparably significant implications for the nature of the representation lawyers give to those clients whom they do choose.

#### IV. HOW SHOULD A CARING LAWYER ACT TOWARDS HER CLIENTS?

Just as the caring lawyer's choice of clients should comport with the responsibilities of care, so too should her treatment of those whom she decides to represent. Of course, there is a sense in which every lawyer who faithfully represents a client has cared for the person she represents. She has, after all, protected his interests, devoted her time to that task, and placed her own words and reputation behind his legal claims. Moreover, it is perfectly possible for a lawyer to do all this without any personal engagement with the client at all, indeed without even meeting him. Certainly it is possible for a lawyer to take such steps without feeling any affection for her client and without in any way developing a personal, emotional relationship with him.

The ethic of care does not forbid such emotional detachment, nor deny that such a practice can be an expression of care. A lawyer with a heavy caseload may be unable to engage more closely with any one client except at the cost of diminished attention and care for many others equally in need. A lawyer representing large classes may be similarly constrained. Moreover, the lawyer may have strong personal reasons—reasons which the ethic of care would insist are appropriate for consideration—that deter her from seeking a closer connection with her clients. Perhaps she is unwilling to form such a connection with a client she considers repellent,

even though she found enough reason in care terms to take the case. Perhaps she hesitates to deepen her ties with her clients because she rightly fears that they will then ask her to respond to personal needs beyond her own expertise or emotional capacity. Perhaps she simply worries that the additional time and energy required for such relationships will impair other relationships, with friends or loved ones, that she values even more profoundly.

I will argue, nonetheless, that the ethic of care encourages the lawyer to develop a personal tie, an emotional connection, to her client. Caring reasons may justify the lawyer's decision not to build such a relationship, but from the perspective of the ethic of care this decision comes at a cost, for in a number of ways the development of such a connection can express the value of care. I will also argue that the ethic of care offers guidance concerning the kind of relationship that will express this value. First, as we will see, a caring relationship is not necessarily a "friendship"; the connection between lawyer and client will very often be more circumscribed, and more unequal, than the image of friendship might suggest. Second, I will suggest that in the relationship she builds, the caring lawyer should recognize a particular responsibility—unless other considerations of care justify a different course of action—to understand the client's perspective, to see the client's situation as he himself sees it. Third, and more disturbingly, I will maintain that the ethic of care offers little hindrance, and perhaps provides positive encouragement, to lawyers who use their personal connection to profoundly influence or even manipulate the decisions their clients make about their own lives.

#### A. THE CARING RATIONALE FOR A PERSONAL TIE BETWEEN LAWYER AND CLIENT

The lawyer's responsibility for developing a personal tie with her client has several sources. Sometimes the lawyer will take a client's case because she actually cares for this particular client. In those circumstances, a failure to connect with the client would blunt the very motivation that led the lawyer to the case in the first place. Similarly, when the lawyer takes a case in response to a client's emotional need, she can hardly fulfill her caring purpose if she holds back from any encounter with the client's actual feelings. More broadly, this responsibility arises because the care present in a detached, impersonal relationship is incomplete. As I have already argued, actually *caring* is part of expressing the ethic of care.<sup>75</sup> The lawyer who represents her client as "a typical slip and fall case," or even as a *cause célèbre*, is not representing her client as a person. No

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75. See *supra* note 62 and accompanying text.

doubt it is at least partly for this reason that we fear that routinized practice, or politically driven test-case practice, may pay too little heed to the actual interests of those for whom the lawyer claims to act.

The responsibility for building a relationship is also a consequence of the lawyer's decision, embodied in the choice to accept the case, to establish a connection between herself and the client.<sup>76</sup> This connection initially may not be a relationship, but even hurried contacts or a paper record are likely to cause the lawyer to get to know the client and the client's needs better than she otherwise would have. The more the lawyer knows, however, the more it is a denial of connection for her not to respond to what she learns. At the same time, it will often also be true that the more of a connection the lawyer forms with the client, the more she will come to know him, and the more she will actually be able to perform the central caring task of responding to her client's needs. Understanding all this in advance, as she should, the caring lawyer should recognize that when she takes a case she is also assuming a responsibility on a human level to the client.

#### B. THE LIMITS OF CARE: THE NATURE OF THE LAWYER'S EMOTIONAL CONNECTION TO HER CLIENT

To meet this responsibility on a human level, the caring lawyer needs to build an emotional connection between herself and her client. This emotional connection will be especially rich if it allows the lawyer to feel care for the client, and the client to feel cared for by the lawyer—and makes it possible for the client to care as well, and for the lawyer to feel that. Perhaps some caring lawyer-client relationships can evolve so far along these lines that lawyer and client become truly, rather than metaphorically, friends. But in many cases neither lawyer nor client will seek, or benefit from, a true friendship. In general, the caring relationship between lawyer and client is likely to remain more bounded, and often more unequal, than that.<sup>77</sup>

Kimberly O'Leary illustrates the delicate line that a caring lawyer may try to follow between emotional openness and professional limits in her relationship with her clients.<sup>78</sup> In a thoughtful reflection on her own

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76: A lawyer who entered into the representation only involuntarily, such as a lawyer appointed to a case over her objections, would not have chosen to establish a connection, and so would not have quite the same caring responsibilities. Even for this lawyer, however, many of the considerations of care outlined in the text would point to the desirability of her building a relationship with her client.

77. Cf. O'Leary, *supra* note 35, at 209 (describing feminist techniques as enabling lawyer and client to become "partners, rather than principal and agent, parent and child, or even friends" (citations omitted)).

78. O'Leary describes her practice in feminist terms but not in terms of the ethic of care,



practice, she reports that she never gives her clients her home telephone number.<sup>79</sup> Most lawyers probably follow this rule, but O'Leary makes this limitation itself a subject of discussion in the relationship she develops with her clients: "I explain that my private time with my family is important to me and that if an emergency arises the client can call an emergency provider of services, such as police or a hotline. I have never had a client express anger about that sort of limit."<sup>80</sup> O'Leary has a practice built around civil suits; lawyers in criminal practice may feel an even more acute need to separate their professional and personal lives.<sup>81</sup>

Just as a caring lawyer may limit the times when she will be available for her clients, so she may also limit the parts of her own life that she reveals (and thus makes available) to them. Professional distance seems to have been a characteristic feature of many counseling relationships, lawyer-client relationships among them.<sup>82</sup> In one thoughtful social work guide to interviewing, for example, students are warned that "[w]ith the introduction of the interviewer's personal opinions and feelings, the relationship may leave the professional level and become a social give-and-take or, worse, an argument."<sup>83</sup> In terms of the ethic of care, however, such personal disclosure by the lawyer can be an important part of developing a meaningful connection with the client. O'Leary agrees that "[s]haring personal experiences can lead to dependence that could be dangerous," and recognizes that "the lawyer might be so eager to share her own experiences that she imposes on the client." Yet, she sees personal disclosure as a signal of her respect for her client, and a way to join the client in "consciousness-raising," and she does not believe it is appropriate "to withdraw and refuse to interrelate."<sup>84</sup> She tells some of her clients about her own experiences or feelings from childrearing and from divorce in the

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to which she only briefly (though positively) alludes. *See id.* at 225. Nonetheless, her account of her practice reflects her care for her clients.

79. *Id.* at 217.

80. *Id.*

81. *See generally* Smith, *supra* note 35, at 54-55 (commenting that a criminal defense lawyer had "incautiously given [her client] her home phone number to facilitate trial preparation," and describing the frightening phone call she received from him after his acquittal).

82. Jack & Jack maintain, as have others, that professional distance is a part of the traditional model of lawyering. JACK & JACK, *supra* note 3, at 39-40; *see also* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 21 (1975).

83. ANNETTE GARRETT, *INTERVIEWING: ITS PRINCIPLES AND METHODS* 37 (3d ed. 1982).

84. O'Leary, *supra* note 35, at 217; *cf.* Spinak, *supra* note 35, at 4, 7, 40, 46-47 (describing aspects and implications of a particularly intense attorney-client relationship, a relationship begun in an interview in which the lawyer, Professor Jane Spinak, "listened to a client for the first time not only as a lawyer but also as a mother and I could not say no" to the case); Sullivan, *supra* note 41 (describing intimacy between clinical teacher and student).

course of counseling them about similar matters.<sup>85</sup> But she seeks a level of self-disclosure that assists the client rather than a flood of self-revelation that might implicitly ask the client to solve the *lawyer's* problems.<sup>86</sup>

This limit reflects a characteristic feature of many caring as well as uncaring lawyer-client relations—their inequality. The fact that the focus of a lawyer-client relationship is rarely as much on the lawyer's concerns as on the client's is itself a form of inequality, for in this sense the client receives more care from the lawyer than the lawyer ordinarily receives from the client. But when the lawyer decides how much of her experience and her life to make available to the client, her making of these decisions likely reflects another form of inequality—an imbalance of power between lawyer and client, and one that favors the lawyer. In some settings, such as poverty law practice, lawyers' power may be very substantial, resting on the clients' tremendous need for legal services and perhaps buttressed by cultural patterns of race or class. Even when lawyer and client are social peers or longtime colleagues, as they typically may be in, say, corporate or estate practice, lawyers may still wield significant power by virtue of their legal and practical expertise and their relative disengagement from the emotional stress the client may face. Indeed, lawyers may enjoy some authority for these reasons even when their clients actually hold great power over them, as a large and valued business client, for example, might. In all of these circumstances, the lawyer who cares for her client is still a lawyer with more or less significant power over the client.<sup>87</sup>

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85. O'Leary, *supra* note 35, at 216-17.

86. *Id.* at 217; cf. Sullivan, *supra* note 41, at 6-8 (describing the value and limits of self-disclosure in clinical teacher-student relationships).

I do not mean to suggest that sharing intimacies is *always* a necessary feature of the caring lawyer's relationship to her client. Indeed, there is evidence that such sharing is a much more characteristic feature of women's relationships than it is of men's. Greeno & Maccoby, *supra* note 3, at 314. It may well be that there are men and women who give great weight to values of care, but do not express them in this fashion; for caring lawyers of this sort, the establishment of a personal connection would remain important, but the method of its establishment could be very different. Moreover, clients vary, and an approach that some clients welcome may be anathema to others. Finally, we should not forget that the caring lawyer may have caring reasons for *not* developing such a relationship with her client—for example because she fears being overwhelmed by the client's emotions.

87. On the inequality of professional-client relations, see Wasserstrom, *supra* note 82, at 16-18; cf. William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1451-54 (1992) (summarizing studies of the relative power of lawyer and client in various contexts). In the text I have tried to identify a range of possible situations in which lawyers wield a measure of power over their clients, but I do not mean to suggest that even those lawyers with substantial advantages over their clients always exercise unchecked authority over them. As Felstiner and Sarat emphasize, it is important to remember that even when one party to a relationship has advantages over the other, the other is unlikely to be altogether without resources. Thus, they maintain that "power in lawyer-client interactions is less stable, predictable, and clear-cut than the conventional view hold," *id.* at 1454, and conclude that

Moreover, and more controversially, I suggest that the ethic of care does not reject inequality. I say this despite the fact that there is much in Gilligan's account that seems to disapprove of perceptions of inequality in relationships. She writes, for example, that women's perception of "the [caring] interconnections of the web" of human contact is distorted by a dominant ideology concerned with "the hierarchical ordering of relationships."<sup>88</sup> Similarly, she sees the hierarchical ranking of different moral claims as characteristic of justice reasoning.<sup>89</sup> Yet, I have already suggested that the ethic of care does treat certain values as more central than others, although it rejects the rigidity of a moral framework that would seek solutions through some easy ranking of profound moral claims. Similarly, I suggest that the ethic of care should acknowledge that inequality can legitimately exist, though it rejects the view that relationships must fit the mold of an inflexible hierarchy.

After all, the paradigmatic caring relationship of mother and child is thoroughly unequal. As Robin West has forcefully argued, this relationship ideally differs from the liberal nightmare of inequality and oppression precisely in that the mother does not exploit the powerless child but instead cares for, and ultimately empowers, her growing son or daughter.<sup>90</sup> Needless to say, many fathers share this vision of their parenting role, and many mothers (and fathers) act in ways woefully far from this ideal; I do not mean to make any claim that caring behavior is intrinsic to mothers or absent from fathers.<sup>91</sup> But in any event the caring parent does the child no favor and achieves no moral end by somehow denying the inequality that does exist. When that inequality is such that parents need to direct their children's lives, paternalism (or maternalism) *is* care. The caring lawyer too may have to define limits in her personal relationship with her client—or, as we will see, to intervene in more substantial ways than that.<sup>92</sup>

### C. EMPATHETIC UNDERSTANDING

I have already suggested that building a personal relationship will enable the lawyer to understand her client better.<sup>93</sup> Achieving such under-

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"[i]n the relationship between lawyer and client, the professional, like it or not, shares power and resources with the client." *Id.* at 1498. I need not pursue here the measuring of the balance of power between lawyer and client; my point, rather, is to show that the comparative advantage which lawyers frequently enjoy is not necessarily incompatible with the ethic of care.

88. GILLIGAN, *supra* note 1, at 49; *see also* Spiegelman, *supra* note 9, at 247-48, 250.

89. GILLIGAN, *supra* note 1, at 26.

90. West, *supra* note 3, at 27-28.

91. *See* Ruddick, *supra* note 16, at 225 (observing that "[m]any women and some men express maternal thinking in various kinds of working and caring with others").

92. *See infra* notes 110-138 and accompanying text.

93. *See supra* text accompanying note 76. There are, however, exceptions to this proposition.

standing should itself be a salient goal of care lawyering. Many feminist scholars have emphasized the need for such understanding, and have urged lawyers and others to seek to understand not only the perspective of those they most resemble, but also the perceptions and wishes of people with whom the lawyer might, at first, feel little in common.<sup>94</sup> Caring lawyers should take this responsibility very seriously, for better understanding will allow the lawyer to provide better services to the client, and—except in those cases where familiarity breed contempt—enable the lawyer to care better as well.

In the process, caring lawyers will naturally seek more than an abstract picture of their client.<sup>95</sup> David Binder and his colleagues, scholars very much concerned with the protection of client autonomy and not expressly reasoning in care terms, have argued persuasively that lawyers must offer their clients empathetic understanding in order to win the clients' cooperation.<sup>96</sup> For Binder and his colleagues, showing empathy means communi-

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The more the client comes to care about the lawyer's approval—as she easily may, if she comes to feel a real emotional tie to the lawyer—the more she may become unwilling to reveal aspects of her thoughts and deeds that she fears will diminish her in her lawyer's eyes. For example, the lawyer who builds her relationship with a client by expressing her sincere agreement with some aspect of what the client has told her runs a risk that the client will never reveal the ambivalence, or even falsehood, that might have underlain the statement that won her approval. Even so, however, expressions of agreement or approval are potentially valuable in forming a strong lawyer-client relationship. *See generally* Ellmann, *supra* note 44. So, too, intimacy can often, though certainly not always, promote understanding.

94. Goldfarb, *supra* note 35, at 1675-87; Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 9, 70-95 (1987); O'Leary, *supra* note 35, at 212-15; *see also* Blum, *supra* note 34, at 485-86 (discussing understanding as itself a moral act). For a discussion of how literature might be employed to nurture an understanding of even so stereotypically repellent a figure as the "bad," abusive mother, *see* Ashe, *supra* note 35.

A commitment to seeking real and respectful understanding of clients has also been a recurrent theme of clinical literature, as Ann Shalleck observes, *see* Shalleck, *supra* note 35, at 1078, and of some "critical" reflection on practice. *See, e.g.,* Alfieri, *supra* note 35; Clark Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971 (1992); Isabelle Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1992); Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992); *see also* sources cited *infra* note 96.

95. Naomi Cahn similarly emphasizes the need for a "contextual analysis," which "places the client's particular legal problem in the totality of the client's actual experiences" (and takes into account the lawyer's context as well). Cahn, *Feminist Critique*, *supra* note 35, at 42.

96. *See* DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 53 (1991) (characterizing empathy as "the real mortar of an attorney-client (indeed, any) relationship" (footnote omitted)); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 116 (1990) (calling empathy "the sine qua non for effective interviewing and counseling"); THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 76, 79-80 (2d ed. 1987) (seeing empathy as promoting "an open, reflective, supportive atmosphere in the [lawyer's] office").

cating to the client that he has been heard, understood, and not judged.<sup>97</sup> Other scholars have suggested that empathy is actually an emotional as well as a cognitive response, and that it involves the lawyer's feeling what it might be like to stand in the client's shoes.<sup>98</sup> The caring lawyer will not wish to sacrifice her capacity for cool-headed judgment,<sup>99</sup> but neither will she be eager to approach her client with her emotions disengaged. Her task is to enter her client's world without leaving her own, to seek a depth of understanding that engages her heart as well as her head.<sup>100</sup>

Much of this may be obvious. What is not obvious, however, is whether the caring lawyer should make a special effort to understand the situation of clients with whom she initially feels she shares little common ground.<sup>101</sup> If caring lawyers never represented clients from whom they felt so distant, we would not have to reach this question, but I have already argued that there are a number of considerations, quite apart from her feeling for the

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97. BINDER ET AL., *supra* note 96, at 40; *see also* BASTRESS & HARBAUGH, *supra* note 96, at 116 (characterizing empathy as "look[ing] at the case through the client's eyes," but not as "shar[ing] the client's values or feelings").

98. *See* SHAFFER & ELKINS, *supra* note 96, at 80; Henderson, *supra* note 44, at 1579-82, 1584 (describing both cognitive and emotional aspects of empathy, and distinguishing this response from "a flooding of feeling, emotion, pain, without a cognitive component"). To completely share another's feelings, or thoughts, is certainly not easy, and may never be fully attainable. To take account of this human limitation, we might define empathy in a way that acknowledges its possible imprecision. *Cf.* Hoffman, *supra* note 45, at 285 (defining empathy as "a vicarious affective response that does not necessarily match another's affective state but is more appropriate to the other's situation than to one's own"). Nel Noddings, however, envisions a "feeling with" the other person that seems particularly intimate; she describes this caring "engrossment" as "a total conveyance of self to other," NODDINGS, *supra* note 3, at 30, 61, and as "essentially nonrational," *id.*, and at times seems to imply that engrossment amounts to an invited seizure or invasion of the self by the other, *see id.* at 22, 31—though she also says that engrossment does not require "a deep, lasting, time-consuming personal relationship" with the person being cared for. *Id.* at 180.

99. O'Leary, *supra* note 35, at 218; *cf.* Smith, *supra* note 35, at 35 ("If a client needed only empathy, s/he would have a court-appointed friend"). For a vivid account of a lawyer-client relationship in which the lawyer closely and painfully bonded with her client—but from a lawyer who nevertheless insists on clients' recurrent need for their lawyers' "procedural protection or substantive guidance," *see* Spinak, *supra* note 35, at 3-7, 36-38, 46-47.

100. Achieving this goal is a matter of skill as well as of moral stance or emotional availability. Lawyers are not therapists and are unlikely to have either the skill or the opportunity for an attempt at therapeutic intervention into their clients' psyches. What they cannot do well, they generally ought not to attempt. Important as this caution is, however, it should not be overstated. Developing a bond with another person is not a function reserved to experts; rather, it is a major part of the stuff of everyday life. In addition, the clinical legal education movement's focus on training students in the skills of interviewing and counseling suggests that law students have the capacity to practice and refine techniques that enhance their ability to connect with their clients. The caring lawyer, recognizing the desirability of building such relationships, should—and can—work to improve her ability to do so.

101. I focus here only on the lawyer's responsibilities to her clients; for a discussion of her responsibilities to those who are not her clients, *see infra* notes 139-172 and accompanying text.

potential client, that might lead a caring lawyer to take on a case.<sup>102</sup> A matrimonial lawyer convinced that current divorce laws are unjust to women, for example, might respond to a particular husband's desperate need for her help, even if she found this man himself an uncaring person. So, too, a corporate lawyer who sees hostile takeovers as a greedy and uncaring "stripping" of corporate assets and of the lives of corporation employees might feel she needed the fees she would earn from representing an investor planning just such a takeover. Having undertaken these cases, should these lawyers now seek to engage their hearts as well as their heads with their clients?

In answering this question, it is important to keep in mind that the ethic of care does not call on those who honor it to care equally for everyone. From a care perspective, it is dubiously universalistic to urge that we extend care in some measure to everyone, and simply implausible to claim that this care for all should be equal.<sup>103</sup> It follows that caring people do not have an equal responsibility to understand everyone either, for the effort to understand is an expression and an exercise of care, and that care will be felt more strongly in some situations than in others.

This is a vision of care as parochialism—all the more so since those for whom we care the least may also be the hardest for us to understand.<sup>104</sup> In fact, much human care *is* parochial, and properly so. No one argues, for instance, that it is some default of duty or responsibility for a parent to care more for her own children than she does for hungry children in distant lands.<sup>105</sup> If this parochialism is proper in care terms, what kind of parochialism is not?

To reiterate that many feminist writers seek to hear voices other than their own is not, by itself, enough to refute this interpretation of care. I say this although I agree with Judith Resnik that an understanding of feminist principles should be arrived at contextually, and thus (in part) by seeing what feminist people actually do.<sup>106</sup> It is possible that the contemporary feminist attention to the position and concerns of the "outsider" owes more to feminists' political perception that they themselves share the status and grievances of outsiders than it does to some characteristic

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102. See *supra* notes 46-66 and accompanying text.

103. See *supra* notes 38-45 and accompanying text.

104. In practice, after all, we tend to empathize most with those most like ourselves. See *supra* notes 44-45 and accompanying text. Without empathy's insights, understanding of another person is surely harder to attain.

105. This is an example used by Charles Fried, for whom it exemplifies the individual's right to lavish her affection and resources where she will. Fried, *supra* note 56, at 1066. The ethic of care does not view the distribution of care as so free an exercise of individual choice; instead, it would support Fried's result on the ground that the parent's greater care for her children is an appropriate reflection of the considerations of care present in the situation.

106. See Resnik, *supra* note 22, at 1928.

intrinsic to a morality of care. Once empowered, the most caring of people may also be dismayingly insular in their care.<sup>107</sup>

It is not necessary, however, to deny the parochialism of much of human care, or to insist on an obligation of universal care, in order to assert that caring people should try to reach beyond their own zone of familiarity to understand the needs of those different from themselves. It is no revelation to say that many human needs echo across lines of apparent division. Discovering such commonalities of need may not be easy, in terms of emotion or time or money, and the caring person can properly take those costs into account in deciding how far to take her effort to understand. But someone who fails to make an attempt at understanding, when such an attempt could be made, may be revealing "deliberate indifference"<sup>108</sup> to the people and the needs she is disregarding. For lawyers, moreover, this responsibility will be particularly salient, because lawyers' work so often involves a degree of association with clients that makes emotional detachment especially hard to sustain in care terms.<sup>109</sup> As we shall see in the next section, however, the responsibility for connecting to the client does not mean that lawyers must surrender their own values to an unquestioning pursuit of their clients' desires.

#### D. GUIDING—OR MANIPULATING—THE CLIENT

Having developed a personal bond with her client, and having attained an empathetic understanding of his needs and concerns, the caring lawyer

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107. It is also possible that the ethic of care is precisely an ethic of the disempowered, and that once empowered those who now reason in care terms will adopt some quite different framework of moral thought. Catharine MacKinnon has insisted that women's care morality is the natural response to their position of dependence on men, and looks forward to the time when a woman's voice will truly be heard because no man's foot will any longer be "on her throat." *Feminist Discourse*, *supra* note 3, at 74 (comments of Catharine MacKinnon). A similar, though less angry, proposition would be that women's moral reasoning has been the morality of personal life, in which women's work has been concentrated, and that as women claim their place in work outside the home they will naturally turn to moral principles more suited to the impersonality of the factory floor and law office than to the hearth and home. See *supra* note 19 and accompanying text. I have already argued that it is a mistake to believe that domestic and work moralities are so disconnected as this; I also doubt that the thinking of women (and the ethic of care, to the extent that it may be a distinctive feature of women's thought) can be reduced to a mere byproduct of oppression. People do not seem capable of creating, or submitting to, systems of oppression so total as that. Cf. Lucie E. White, *Seeking "... The Faces of Otherness ...": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499, 1503-04 (1992) (welcoming Foucault's critique of the notion of monolithic power, in which "the subordinated can speak nothing except their masters' will").

108. "Deliberate indifference" is a phrase from the Supreme Court's Eighth Amendment jurisprudence. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The Court's use of the phrase suggests the relevance of care concerns to an understanding of the constitutional prohibition of "cruel and unusual punishments."

109. See *supra* text accompanying note 76.

must now decide how to wield the tremendous influence over her client that emotion and understanding combine to give her. In an influential exploration of the impact of the ethic of care on lawyering, Carrie Menkel-Meadow argues that caring lawyers, "with their ability to 'take the part of the other and submerge the self,' may be able to enter the world of the client, thereby understanding more fully what the client desires and why, without the domination of what the lawyer perceives to be 'in the client's best interest.'"<sup>110</sup> Menkel-Meadow's suggestion that caring lawyers will not be domineering ones is reassuring, because the very understanding and warmth that should develop between a client and a caring lawyer are likely to enable the lawyer to manipulate the client with great subtlety and effectiveness—if that is what the lawyer wishes to do.<sup>111</sup> Unfortunately, although there is force to Menkel-Meadow's argument, I believe that she has underestimated the degree of lawyer domination that is consistent with an ethic of care.<sup>112</sup>

Menkel-Meadow's argument implies that the caring lawyer will not act paternalistically because she will have achieved a true understanding of the client's point of view. Seeing the client's situation as the client sees it, the lawyer will not be tempted to interfere with the client's assessment of

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110. Menkel-Meadow, *supra* note 3, at 57; Menkel-Meadow, *Excluded Voices*, *supra* note 35, at 45.

111. Cf. Ellmann, *supra* note 45, at 733-53, 768-70 (describing manipulative features of client-centered lawyering).

112. A somewhat similar concern can be raised about "consciousness raising," which Katharine Bartlett has characterized as a central element of "feminist legal method." Bartlett, *supra* note 33, at 863-67. Bartlett acknowledges, but does not emphasize, the danger that a process of consciousness raising will result in some people defining how to raise other people's consciousness. See *id.* at 865, 887. Ruth Colker similarly suggests that consciousness raising in groups necessarily exposes each individual to the particular influences of that group's members. She comments that "[c]onsciousness raising can expose us to questions from others," and she welcomes that exposure. But she also urges feminists to consider such techniques as "contemplation or meditation," which might "provide us with the space to resolve these questions removed from others' expectations for us." Ruth Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity*, 68 B.U. L. REV. 217, 245-47 (1988) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987)).

I do not mean to dismiss the experience of shared self-discovery that consciousness-raising groups can bring to their members, nor to deny the insights such experiences can generate. I agree that consciousness-raising can be a process in which, as Leslie Bender has put it, "[w]hat were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression." Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 9 (1981). But these groups are not immune from the dynamics that can affect any human encounter. In particular, when groups are not composed of equals, but of leaders or guides and relative novices, then the process that ensues may not be purely one of shared self-discovery. Instead, it seems likely to become guided (by some) self-discovery (by others). Indeed, if the process were not in some way guided by a political perspective, surely a group of people's seemingly personal hurts would not always "reveal themselves" to those very people as the product of shared oppression.



his own needs and priorities, for she will understand how he came to make this assessment. Menkel-Meadow is surely right that a lawyer who does achieve a real understanding of her client will be less likely than a more ignorant counterpart to engage in *inaccurate* paternalism. She will not imagine that her client wants one thing when he actually wants another, nor will she maintain that his plans are silly when in fact they make good sense in his situation, nor will she force her judgments upon the client when the psychic cost to her client of this imposition will outweigh any benefits her trained professional advice could bring. In each case, she will know better. Together, these categories may cover a great many of the instances in which less caring and less knowledgeable lawyers would think they needed to intervene.<sup>113</sup>

But it does not at all follow that the caring lawyer will refrain from paternalistic intervention when she believes that the very knowledge she has gained from her close engagement with her client demonstrates the need for action. Knowing the client as well as she does, she may be more confident that when she does perceive a case for paternalistic intervention, her perception is well-founded. Suppose, for example, that the lawyer represents a battered wife, who seems unable to free herself from the thrall of her husband's power and who is now intent on dropping her suit for a protective order and letting her husband move back into the family home. Convinced, as the caring lawyer might be, that the wife's current "choices" are the product of the same domination that she had briefly summoned the determination to challenge, the lawyer must now decide whether to counsel the client in words so gut-wrenching that they will shake her new resolution. Feeling sure that her client faces harm and that her manipulative counseling would do less damage than would her silence, should the lawyer not see her own failure to act as a form of indifference?

Of course, one could respond that the lawyer's intervention nonetheless breaches her client's autonomy. Such arguments have great force within a morality of rights that emphasizes separation and autonomy,<sup>114</sup> concerns

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113. We should not assume, however, that the caring lawyer will always understand her client and his situation better than other lawyers would. Our understanding is influenced by our own preconceptions, and it seems likely that any given world view will have not only distinctive strengths but also distinctive weaknesses as a source of insight. Thus, a caring lawyer may be better than more rights-minded colleagues at sensing her client's feelings of responsibility toward others, but by the same token she may be worse at hearing her client's feelings that others are blocking his self-expression. I am grateful to Karen Gross for pointing out this possibility to me.

114. Even from a rights perspective, however, the case of the battered wife might be an appropriate occasion for paternalistic intervention. A concern for autonomy does not prevent, and might encourage, a recognition that there are circumstances in which a person is so impaired that his actions do not in a meaningful sense constitute expressions of his autonomous choices. In such cases, paternalistic intervention to protect this person's best

that Gilligan at times suggests are characteristically masculine ones.<sup>115</sup> But the concern for autonomy has much less force within the ethic of care, which emphasizes people's interconnection and responsibility rather than their independence and autonomy.<sup>116</sup> Breach of autonomy is not the central vice within the ethic of care; indifference is.<sup>117</sup> Indeed, the most familiar example of care, the care of a parent for his or her children, is necessarily paternalistic at times.<sup>118</sup> As I have already argued, the ethic of care does not deny inequality; neither does it prohibit paternalism. Both the depth of her knowledge of her client, and the strength of her distaste for detachment from her client's needs, will in some circumstances make the caring lawyer a decidedly paternalistic one.<sup>119</sup>

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interests may preserve rather than impair his autonomy. For somewhat contrasting views on the circumstances in which paternalism by lawyers is consistent with respect for client autonomy, see Ellmann, *supra* note 45, at 758-61, 764-73; David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (1981).

115. See GILLIGAN, *supra* note 1, at 7-9 (discussing the psychoanalytic theories of Nancy Chodorow); *id.* at 33-39 (tracing similar themes in Gilligan's own interview data).

116. Thus, Spiegelman suggests that an ethic of rights identifies "interference with rights of others" as a central "evil," while in an ethic of care "indifference to others" and "detachment" fall into this category. Spiegelman, *supra* note 9, at 250 tbl. 1. Cf. *supra* text accompanying notes 67-70 (discussing autonomy and connection in lawyers' selection of cases).

117. Spiegelman, *supra* note 9, at 250 tbl. 1. This is not to say that autonomy is a matter of no concern within the ethic of care. Autonomy does matter; if it did not, it would scarcely make sense for care reasoners to extend care to themselves or to be concerned, as Gilligan emphasizes they are, with maintaining their integrity in the face of pressures to please others. See GILLIGAN, *supra* note 1, at 95, 149, 164-66. Moreover, as Laura Stein has observed, "Some degree of autonomy, for example, must be presupposed for people to enter into fulfilling relationships"—at least after childhood. Laura W. Stein, *Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 MINN. L. REV. 1153, 1174 (1993). But it is impossible to see autonomy as having the same importance in care terms as it does in a more individualistic focus on rights. Indeed, after citing what she calls "the essential notion of rights, that the interests of the self can be considered legitimate," Gilligan comments that "[i]n a sense, the concept of rights changes women's conceptions of self, allowing them to see themselves as stronger and to consider directly their own need." GILLIGAN, *supra* note 1, at 149. This observation implies that the ability of mature care reasoners to care for themselves may rest in part on rights thinking rather than solely on refinements in their understanding of care.

Even if autonomy were a matter of greater salience in care terms, it would deserve emphasis that care reasoning resists resolving moral problems by applying automatic rules that give one concern priority over another. Autonomy would still have to be considered along with other concerns within the framework of care, and there would be no reason to assume that autonomy would always prove to be the decisive consideration.

118. Sara Ruddick, in her analysis of "maternal thinking," points to occasions for paternalism (or, as she might put it, maternalism) not only in the mother's task of preserving the life of her child but also in her efforts to raise an "acceptable" child, whom society will accept and whom she herself "can appreciate." Ruddick, *supra* note 16, at 216, 220.

119. Discussing the "moral dimensions . . . of caring for others," Joan Tronto observes that "[t]here is some relationship between what the cared-for [person] thinks he or she wants and his or her true interests and needs, although it may not be a perfect correspondence. A patient in the hospital who refuses to get up may be forced to do so. A child who wishes

Perhaps, however, the actual practice of caring lawyers demonstrates that this conclusion is mistaken. This ethic's own attention to context suggests, after all, that we should not reach conclusions about its implications by disembodied theorizing.<sup>120</sup> Thus, it is by no means irrelevant that Menkel-Meadow and others who appear to find value in the ethic of care also seek to avoid paternalism.<sup>121</sup> I am not persuaded, however, that more comprehensive evidence will confirm that abstention from paternalism is characteristic of caring lawyers. Indeed, there is already considerable evidence from other lawyers' practices that care and paternalism are compatible or even intertwined.<sup>122</sup>

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only to eat junk food may be disappointed by parents' reluctance to meet this wish. Genuine attentiveness would presumably allow the caretaker to see through these pseudo-needs and come to appreciate what the other really needs." Tronto, *supra* note 74, at 177.

120. As Judith Resnik has suggested, one should arrive at an understanding of feminist principles contextually, by reflecting on what feminist people actually do. See *supra* text accompanying note 106.

121. See Goldfarb, *supra* note 35, at 1684 n.352 (emphasizing that lawyers should not impose feminist consciousness raising on their clients); Menkel-Meadow, *supra* note 3, at 57; O'Leary, *supra* note 35, at 212, 217 (urging that through listening, honesty, and respect the lawyer can build a relationship with her client in which she can express "her views without intruding upon the client's authority"); cf. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (reflecting on the difficulties that subordinated people face in making their voices heard in our society, and on the extent to which even well-meaning lawyers for the subordinated may become complicit in this silencing). But cf. O'Leary, *supra* note 35, at 235 n.62 (raising concern that feminist consciousness raising, a technique she endorses, may be paternalistic). Gilligan also offers some support for the idea of care as incompatible with paternalism, when she writes that care requires attention to the "terms" within which others live. "The question of what responses constitute care and what responses lead to hurt draws attention to the fact that one's own terms may differ from those of others. Justice in this context becomes understood as respect for people in their own terms." Gilligan, *Moral Orientation*, *supra* note 3, at 24.

122. Thus, Abbe Smith, writing from a criminal defense background, maintains that "[t]here are times when a criminal lawyer, if he or she is a caring and zealous advocate, must lean hard on a client to do the right thing." Smith, *supra* note 35, at 37. She comments that "[t]hough it may not be popular among either egalitarian feminists or non-hierarchical clinicians, I suggest there is a difference between foot-stomping and arm-twisting," *id.* at 37, and she insists that there are times when the latter is appropriate. *Id.*; see also Peter Margulies, "Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C. L. REV. 213 (1990) (arguing, though not in terms of the ethic of care, for lawyers' efforts to influence their clients, if necessary by the threat to withdraw, as part of counseling the clients on such issues as the potential for harm to third persons).

Similarly, Rand Jack and Dana Jack declare that the lawyer who is sensitive to the concerns of care and of rights "remains an advocate but no longer acts as a mouthpiece in the traditional sense. Neutrality rather than judgment is suspended; responsibility ceases to mean restraint from interference with the rights and values of others"—including the client. JACK & JACK, *supra* note 3, at 118. They illustrate the impact of sensitivity to care by quoting the words of a lawyer who found it impossible to defend a man who had gotten drunk and beat up another man. This lawyer says:

[The prosecutor] was recommending initially that the guy go to alcohol treatment, and I was agreeing with him. But my client wouldn't agree to it at all. His goal was for me to get him out of this charge. And I was looking at it from the standpoint of

A number of factors might explain the inconsistency between the views of caring lawyers who might reject paternalism and the arguments I have offered. Some caring lawyers may have found that when they reached a more profound understanding of their clients, the facts as they came to perceive them did not support paternalistic intervention, however justifiable such intervention might be in other circumstances. Perhaps the close engagement between a caring lawyer and her client also builds a degree of client trust so great that lawyers no longer need to engage in paternalistic control, because they can legitimately influence by guidance and suggestion from within the circle of intimacy, rather than by directive from without.<sup>123</sup> Both of these would be happy results, but they would not demonstrate that care and paternalism were inconsistent.<sup>124</sup> Moreover, if

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what's going to help this character. And certainly alcohol treatment would have provided an opportunity for help. Maybe ultimately it wouldn't have helped him if he didn't want it, but at least the opportunity would have been there.

*Id.* at 115. Ultimately this lawyer withdrew from the case rather than proceed to get her client off without his underlying problem being addressed. *Id.* For other examples of caring paternalism, see *id.* at 76 (lawyer reluctant to secure an acquittal for a hypothetical mentally ill and dangerous defendant); *id.* at 83 (lawyer who would require evaluation of hypothetical client's fitness to have custody of his children, if she believed that his getting custody would not be in the children's best interest).

123. In O'Leary's terms, lawyer and client may have become partners. O'Leary, *supra* note 35, at 209. They might also be seen as having become intimates, who are permitted and expected to influence each other in ways that might be barred to strangers as manipulation or coercion. See Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 665-66 (contrasting the permissible interactions between spouses or friends with the conduct appropriate to lawyers); cf. Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1169 & n.163 (1992) (suggesting that such influence might also be acceptable from lawyers who became their clients' political allies).

Even within a circle of intimacy, however, one party may take advantage of another; this possibility is all the more significant if the parties to an intimate relation do not meet each other as equals. Thus, we should not assume that the achievement of such a relationship validates all that may happen within it. Felstiner and Sarat offer an unsettling example of this problem, in their description of "[o]ne lawyer in Massachusetts [who] routinely engages in behavior common among friends, but rare in lawyer-client interaction. She reveals extraordinary biographical detail to her clients, talking at length about her own divorce, health, finances, housing, and the eating habits of her children. This lawyer violates the standard understandings of professional distance, becoming friend and therapist as well as legal adviser. These multiple roles enable the lawyer who adopts them to use therapeutic moves and appeals to friendship to shape her clients' definitions of reality and blunt any critique of her performance." Felstiner & Sarat, *supra* note 87, at 1465 (footnote omitted).

124. Still another explanation would be that in evaluating paternalism even lawyers who set great store by the ethic of care also see an important role to be played by a commitment to the protection of individual rights and autonomy. As we have already seen, there is evidence that people do not apply either care or rights reasoning equally to all contexts; instead, particular situations may call forth different forms of reasoning. See *supra* note 21; cf. *supra* note 34 (on potential convergence of ethics of care and justice).

Finally, as my colleague Laura Stein has suggested to me, some caring lawyers may oppose

some caring lawyers find paternalism unnecessary, other lawyers who see themselves as caring may find it all too attractive, for it may be disturbingly easy for them to see their actions as helpful and benevolent when their clients experience them as unwelcome and imposing.<sup>125</sup>

It is important to remember, in addition, that domination by the lawyer is not only the result of the lawyer's assessment of her client's best interests. Lawyers may seek to exercise power over their clients to protect their own interests as well, and some measure of this sort of domination might be justified in care terms as an exercise of the lawyer's care for herself. She might, for example, decide to resist her client's demand that she present an argument that she viewed not as frivolous but as weakening the client's case, not simply out of a commitment to her client's best interests, but also out of a desire to maintain her reputation as an effective lawyer.<sup>126</sup>

More importantly—and more directly invoking considerations of care—she might wish to resist her client's directions because she felt that they were profoundly inconsistent with the ethic of care. Faced with the possibility of treating a third party with indifference, the caring lawyer

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paternalism, in the last analysis, not out of care but out of a separate feminist conviction that allowing paternalism tends to legitimize the domination of women.

125. Just as the ethic of care may foster particular strengths and weaknesses in lawyers' perceptions of their clients' situations, *see supra* note 113, so it may foster particular moral strengths and weaknesses. It seems all too human for people who value care to believe they themselves are caring, and to believe this even when their actions may have other purposes or other effects as well. Lucie White sees this danger as even more acute than I am suggesting; she writes that "[w]e must not discount the risks imposed by theories that make human connection seem too easy to attain . . . . Such theories have typically sanctioned domination of the most insidious kind, by encouraging the privileged to name the feelings of less powerful others, without cautioning that to name other's feelings is also to silence their voice." White, *supra* note 107, at 1506-07.

Even very conscientious people are subject to such fallibility; in addition, it is unfortunately true that lawyers who adhere to the ethic of care, like lawyers who subscribe to a morality of rights, may not be so conscientious, and may find it comfortable to invoke their moral views to explain away the inadequate work they do. Felstiner and Sarat offer what may be an example of such a lawyer in their recent study of the interaction of a divorce lawyer and her client. Felstiner & Sarat, *supra* note 87. The lawyer presents herself as someone who transforms her clients: "And I guess the major satisfaction we've gotten out of it is to see some of these women come in who are just, I mean you have to scoop them up in a basket, they are just so awful . . . . And how we can bring them in here and they are absolutely spineless creatures that are just spread all over the floor and build them back into something with a spine and a backbone and finally realize, I'm a human being and I have rights, and they learn to stand up for themselves." *Id.* at 1494. This example is a troubling one, because this lawyer's performance in the case that Sarat and Felstiner study seems markedly ineffectual. In any event, the client "was by no means remade into a new woman. In fact, [the lawyer] candidly admits to compounding the client's difficulty of self-assertion." *Id.* at 1495.

126. *Cf. Jones v. Barnes*, 463 U.S. 745, 754 (1983) (finding that appointed counsel has no duty to raise "every 'colorable' claim suggested by a client").

might feel that her client's autonomy—or, as she might put it, his denial of responsibility towards this third party—should not bar her intervention. Whether she could take her concern for third parties as far as to deliberately disserve her client's wishes is a matter I will examine in the following section. She would not need to reach that question, however, if she were able to persuade her client to abandon his current, uncaring preferences. Declining to rank client autonomy as automatically superior to other moral concerns, the caring lawyer could properly feel that she should try to reshape her client's decisionmaking rather than permit him to make a putatively independent, but uncaring, choice. From a perspective that did place a higher priority on autonomy, such an approach could readily be seen as unjustifiable manipulation.

In a number of respects, the lawyering behavior that the ethic of care appears to authorize is quite consistent with the import of existing codes of ethics. Both the Model Code and the Model Rules insist that certain decisions—seemingly, however, not very many—are necessarily left to the client.<sup>127</sup> The Code and the Rules also envision a similar decisionmaking process in which clients arrive at these decisions in an informed fashion after having received their lawyers' advice.<sup>128</sup> Moreover, both approve of lawyers' giving moral as well as technical advice.<sup>129</sup> There are also clear indications in the Code and Rules that the lawyer can give advice even when the client does not want to hear it.<sup>130</sup> The relationship between a caring lawyer and her client described above can be squared with each of these propositions.

The upshot of the analysis I have offered, however, is that the ethic of care appears to authorize a significantly greater degree of intervention in client decisions than do the existing codes of ethics. Admittedly, the Code and the Rules do not offer a clear statement of the proper constraints on the manner and intensity with which lawyers should render this advice. Instead, they contain tantalizing hints: that the lawyer may press her point rather than merely stating it,<sup>131</sup> that under some circumstances she may temporarily withhold relevant information to forestall what she deems an unwise reaction on her client's part,<sup>132</sup> and that the lawyer-client relation-

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127. MODEL RULES, *supra* note 46, Rule 1.2; MODEL CODE, *supra* note 46, EC 7-7.

128. MODEL RULES, *supra* note 46, Rules 1.4, 2.1; MODEL CODE, *supra* note 46, EC 7-8.

129. MODEL RULES, *supra* note 46, Rule 2.1; MODEL CODE, *supra* note 46, EC 7-8.

130. MODEL RULES, *supra* note 46, Rule 2.1 and cmt.; MODEL CODE, *supra* note 46, EC 7-8.

131. See MODEL CODE, *supra* note 46, EC 7-8 (authorizing the lawyer to withdraw in certain cases when the client "insists"—presumably in the face of the lawyer's vigorous urging to the contrary—"upon a course of conduct . . . contrary to the judgment and advice of the lawyer").

132. See MODEL RULES, *supra* note 46, Rule 1.4 cmt. 4 (allowing the lawyer to withhold information from the client "when the client would be likely to react imprudently to an

ship can become more a joint venture than a principal-agent relationship.<sup>133</sup> Perhaps these add up to a suggestion that lawyers are authorized to design their counseling so as to make distinct inroads into client autonomy, even in the framework of the existing rules of ethics.<sup>134</sup>

But this suggestion remains a suggestion; it does not appear to be the main thrust of either of the existing professional codes. These various hints of the propriety of counseling that constrains client autonomy remain sketchy. They are hard to square with the ethos of autonomy that is so prominent in the Model Code,<sup>135</sup> and that, although not as explicitly, seems to underlie many of the Model Rules as well.<sup>136</sup> Certainly there is no overt authorization or encouragement of intervention into client decisions to the degree the ethic of care would sanction.<sup>137</sup>

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immediate communication"). For criticism of this comment to the Model Rules, see 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.4:103 (2d ed. 1990) (arguing that a lawyer should only withhold information from a client in extreme cases, not just because the client may "react imprudently").

133. MODEL RULES, *supra* note 46, Rule 1.2 cmt.

134. The provisions of the Rules and Code discussed in the text all apply to clients who are, at least in general, competent to make decisions in their own cases. Both the Rules and the Code also authorize more substantial intervention by lawyers when their clients are incompetent. MODEL RULES, *supra* note 46, Rule 1.14; MODEL CODE, *supra* note 46, EC 7-11 & 7-12. Like the provisions already discussed, these sections do not clearly mark out the boundaries of lawyers' authority over their clients. Rather, they continue the pattern of ambiguity we have already identified, both in their definitions of the degree of client impairment that will justify lawyers' action and in their specifications of the sorts of actions lawyers with such clients can take. Thus, EC 7-12 declares in part that "[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer," while Rule 1.14(a) provides that "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible maintain a normal client-lawyer relationship with the client." Both provisions leave ample room for interpretation.

135. See, e.g., MODEL CODE, *supra* note 46, EC 7-1, which declares that "[i]n our government of laws and not of men, each member of society is entitled to have his conduct judged and regulated in accordance with the law, to seek any lawful objective through legally permissible means, and to present for adjudication any lawful claim, issue, or defense." (footnotes omitted) This principle is underscored in DR 7-101(A)(1), which makes it a disciplinary offense in most circumstances for a lawyer intentionally to "[f]ail to seek the lawful objectives of his client through reasonably available means . . . ." *Id.* DR 7-101(A)(1).

136. The Model Rules echo the Code's call for "zeal" from the lawyer in the comment to Rule 1.3, although the Rule itself does not contain this word and instead mandates only "reasonable diligence and promptness." MODEL RULES, *supra* note 46, Rule 1.3 and cmt. Other provisions, however, also seem to turn on client autonomy, albeit without explicit rhetorical declarations to that effect. See Rule 1.6 (confidentiality); Rule 1.7 (conflicts of interest). For a hesitant departure from the priority on individual clients' autonomy, see Rule 2.2 (intermediation).

137. Second, to the extent that authority can be found within the Rules and Code for intervention in client decisionmaking, it should be noted that these statements of profes-

Should we welcome the ethic of care's acceptance of increased intervention by lawyers into their clients' decisions? In other situations that we have considered so far—encouraging personal connection between lawyers and clients, and fostering lawyers' empathetic understanding of those whom they choose to represent—the ethic of care in my judgment enriches lawyer-client relations. Now, however, we have found within that same ethic a sanction for limiting clients' prerogatives of free decisionmaking. We have also seen that the same enhanced personal ties that the ethic of care encourages may serve as the basis for lawyers' caring interference with their clients' choices.

Professional acceptance of these implications of the ethic of care would in one important respect be welcome. It would recognize what I suspect is a reality of legal practice—that lawyers *do* frequently impinge on their clients' autonomy, whether for the clients' best interest, for the lawyers' own benefit, or for the sake of third parties—and would acknowledge that considerations of care do provide moral reasons for a measure of intrusion on client decisionmaking. It would accept and bring into the sunlight conduct that now finds its sanction largely in the cloudy ambiguities of the codes of professional ethics.

Yet, the ethic of care's interventionist implications are also profoundly dangerous, for its teachings might provide a mantle for radical, rather than modest, intrusions on client autonomy. As we have already seen, the ethic of care does not treat autonomy as a preeminent value. Even in theory, therefore, this ethic in certain circumstances encourages lawyers to intervene in their clients' choices. In practice, the effects may be even greater, for the temptation for some lawyers who see themselves as caring to validate their intrusions on client autonomy in the name of care may be very strong. In many cases, such intrusions would, in my judgment, represent unjustifiable breaches of human liberty.

Hence, I suggest that although it would be a positive step to acknowledge that considerations of care can justify lawyers' intense and even intrusive engagement in client decisions, these considerations should not become central to ethical guidance in this sphere. The core of this guidance, instead, should remain an explicit protection of clients' decisionmaking rights. The ethic of care, then, would not displace the ethic of rights in this field; rather, it would give shape to the "measure of intrusion" on those rights that can properly be justified. The result would undoubtedly

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sional obligation do not call on lawyers to exercise their authority in accordance with the ethic of care. To be sure, the Rules and Code also do not prohibit lawyers from taking considerations of care into account in resolving uncertain questions of professional responsibility. If the ethic of care were to be recognized as central to lawyers' morality, however, its implications would need to be integral, rather than optional, to the judgments that lawyers are called upon to make.



leave room for debate and for discretionary judgment, as I have already suggested that guidelines derived from the ethic of care characteristically would.<sup>138</sup> But this is a field already plagued with ambiguity, and the guidance derivable from the ethic of care might make the practical task of tracing the boundaries of client choice and lawyer guidance somewhat less intractable.

#### V. HOW ZEALOUSLY SHOULD A CARING LAWYER REPRESENT HER CLIENTS?

I argued earlier that caring lawyers *could* represent clients, as long as the responsibilities entailed in representation were not inconsistent with the ethic of care. But that formulation did not identify which responsibilities would be consistent with care. It remained to be seen whether the responsibilities a caring lawyer could undertake were at all consistent with those now enjoined upon lawyers by the rules of ethics. So far we have defined only one aspect of those responsibilities, namely the concerns that should guide the caring lawyer as she develops a relationship with her client, interacts with him, and counsels him.<sup>139</sup> We have found that the ethic of care authorizes a more profound intervention in clients' decision-making than current rules encourage—though it also calls upon lawyers to develop a personal connection with their clients that in many cases, if not most, would mean that the caring lawyer's approach to her client would be more supportive than current rules require. We must now confront another fundamental issue bearing on the responsibilities of representation: the question of zeal. This question is fundamental because it brings into sharp relief the potential contradiction between the lawyer's efforts to assist the client she has chosen to represent, for reasons of care, and her refusal to become, for the sake of her client, indifferent to the needs of others with opposing interests. I will argue that in most circumstances the ethic of care confirms the moral validity of the duties lawyers owe to their clients—but that this ethic also, and properly, points to important exceptions in which care calls for an abridgement of zeal.

Before determining how a caring lawyer ought to act when care and zeal are in tension, however, we should first mark out the range of circumstances in which this tension will not be a critical problem. Often, the caring lawyer's clients will not seek to treat others uncaringly; after all, one of the major factors in her decision to take their cases was her judgment

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138. See *supra* notes 36-37 and accompanying text.

139. We have also examined the lawyer's responsibilities in the selection of cases. The guidelines that care provides in this area are significantly different from those of current ethics codes, but these guidelines do not speak to the nature of the responsibilities the lawyer will take on when she selects a case.

about whether their objectives were caring.<sup>140</sup> Often, too, the lawyer can persuade her clients to accept the limits that she believes care places on their objectives and her efforts, especially if my analysis of the permissible character of caring lawyers' persuasive efforts is correct. In still other circumstances, in which the client refuses to adopt caring objectives, the lawyer may still represent him zealously because care for herself outweighs the other moral costs involved in her pursuing the case. Plainly, however, these cases do not exhaust the field. There will remain cases in which zealous representation of the client means furthering the client's goal of treating others uncaringly, and in which the lawyer is not constrained to take such a step because of needs of her own. As to these cases, we must ask whether a lawyer should do what her client wants.

The stakes are very high. If she pursues the client's objectives, the caring lawyer lends herself to his uncaring venture and inflicts harm on people whose needs she believes should have been better honored. If she does not pursue the client's objectives, but continues to represent him, she must betray the client in one sense or another—whether simply by failing to press the case as she could have, or by more affirmative betrayals such as the disclosure of confidential information.

It might be objected that the lawyer could escape this Hobson's choice by withdrawing from the case. For a caring lawyer, however, this option—assuming it would actually be available<sup>141</sup>—would rarely be attractive. Her withdrawal would save her from direct involvement in the infliction of harm, to be sure, but only at the price of failing to serve the client she agreed to help. Moreover, her withdrawal may only mean that her client approaches another lawyer, who then must resolve the same moral problem—or who may be led into overlooking the matter because the client,

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140. See *supra* text accompanying notes 64-66 (discussing the role of this judgment in the lawyers' decision to take or reject the case).

141. The Model Rules and Model Code differ in the extent to which they allow lawyers to take considerations of care into account when deciding to withdraw from a case. The Model Rules permit a lawyer to withdraw from a case when "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent," even if withdrawal will harm the client, see MODEL RULES, *supra* note 46, Rule 1.16(b)(3), unless a tribunal orders the lawyer to continue on the case. *Id.*, Rule 1.16(c). The Model Code is less solicitous of lawyers' desire to avoid association with repugnant objectives. It permits withdrawal when the client "[i]nsists . . . that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules," but only "in a matter not pending before a tribunal." MODEL CODE, *supra* note 46, DR 2-110(C)(1)(e). A withdrawal rule fashioned in light of the ethic of care might accept the Model Rules' suggestion that lawyers' moral concerns are a basis for withdrawal even in cases pending before tribunals, but would likely call on lawyers contemplating withdrawal to consider the potential harm to their clients more seriously than the Rules seem to require. In any event, as I suggest in the text, withdrawal may constitute a form of indifference both to clients and to others affected by the case, and so the ethic of care would probably guide lawyers to explore other possible solutions to their moral difficulties first.

now schooled in lawyers' ways, edits his account of the case. Thus, withdrawal shades into conduct that the caring lawyer can properly label as indifference, and offers her not an easy escape but only another unpalatable option.<sup>142</sup>

In some circumstances withdrawal would not resolve the lawyer's problem at all. Consider, for example, the notorious "Hidden Bodies" case.<sup>143</sup> There the lawyers appointed to represent a murder defendant learned from their client that he had committed other murders. He told them where the bodies of his victims were, and the lawyers found and photographed them. They did not, however, reveal their knowledge to the father of one of the victims, when he appealed to them for any information they had about his daughter. Their reason, one that is well-founded in the current rules of legal ethics, was that revealing this information would be a breach of confidentiality.<sup>144</sup> Perhaps, as I will argue, a caring lawyer would find such a response to an anxious and grieving parent unbearably heartless. She would not feel, however, that withdrawal would solve her ethical problem, for she would be just as burdened both by her knowledge and by the continuing duty of confidentiality (as it currently is understood) after withdrawing as before.<sup>145</sup> Once she quit the case, moreover, she would lose her access to her client, and so forfeit the chance to persuade him to

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142. Indeed, for a caring lawyer even the decision not to accept a case may have a disturbing flavor of indifference. Refusal of a case seems more acceptable than later withdrawal, however, because at this initial point the lawyer lacks the connection to the client that she will later develop, as well as the knowledge of, and connection to, the client's adversaries that would also grow over time.

143. I draw here on the account of this case in DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 258-60 (1992). The judicial system's treatment of these events is reported in *People v. Belge*, 372 N.Y.S.2d 798, *aff'd on other grounds*, 376 N.Y.S.2d 771 (1975).

144. Both the Model Rules and the Model Code have provisions authorizing lawyers to disclose their clients' intention to commit a crime. See MODEL RULES, *supra* note 46, Rule 1.6(b)(1) (lawyer may reveal information to prevent the client from committing a crime likely to lead to "imminent death or substantial bodily harm"); MODEL CODE, *supra* note 46, DR 4-101(C)(3) (lawyer may reveal information to prevent the client from committing a crime). Neither would ordinarily authorize the lawyer's disclosure of the client's past crimes, however repellent. It is possible, but unlikely, that in this exceptional case a plausible exception could have been found that would have permitted disclosure. Such an argument might have invoked New York's statute "requir[ing] . . . anyone knowing of the death of a person without medical attendance [to] report the fact to the proper authorities," RHODE & LUBAN, *supra* note 143, at 258, and reasoned that the client's intention to continue concealing the location of the bodies from the authorities represented an intention to commit a future crime. This argument strikes me as problematic at best; such persuasive power as it has, I suggest, is primarily the result of its opening the door for considerations of care to be taken into account. I will argue that considerations of care *should* be taken into account in this case—but overtly and directly, rather than "through the back door."

145. See MODEL RULES, *supra* note 46, Rule 1.6 cmt. 5 (lawyer required to keep client's confidences after withdrawal); MODEL CODE, *supra* note 46, EC 4-6 (lawyer required to keep client's confidences after termination of employment).

permit her to act in accordance with her sense of the responsibilities of care.

If withdrawal would not solve the caring lawyer's problem, how should she handle the Hidden Bodies case? This is a difficult question, and one that deserves close examination. This examination will be useful, in part, as an illustration of the process and import of care reasoning. As we will see, there are substantial considerations of care weighing both for and against disclosure by the lawyer. But these cross-cutting considerations do not mean that the ethic of care offers no answers to moral problems, and I will argue that in these circumstances care ultimately does suggest an answer that may be startling—namely that the lawyer should answer the father's plea. This examination will also be important, however, because the analysis it generates suggests much broader conclusions about the nature of lawyers' duties of advocacy under the ethic of care—duties which I will suggest are usually, but not always, consistent with the requirements of the current rules of ethics.

Let us begin with the arguments in favor of disclosure. The victim's father is in pain, to which the lawyer will want to respond. Her own client's crimes were uncaring—to say the least. If it was the client's idea to trade evidence of these unsolved crimes for a plea bargain (the strategy the lawyers in the actual case attempted to employ), his willingness to exploit his victims even after their deaths compounds his indifference to others. Moreover, pursuing the client's objectives of secrecy and strategic use of the information may require the lawyer not only to assist in another's indifference but to manifest indifference herself. If the victim's father approaches her, she must personally refuse to give him the information he seeks; if she wants to avoid triggering further investigation of her client, she must even give the impression that she really has no information at all, because telegraphing the message that she has information that she will not reveal will naturally spark further inquiry. All of this gives the caring lawyer strong reason to respond to the father's plea.

At the same time, the caring lawyer has strong reason to keep her client's secrets. She believes, after all, that she should form a genuine personal connection with her clients, even those with whom she initially finds little common ground. Valuing connection as she does, she has reason to believe in the importance of client confidentiality, for the keeping of secrets is a part of building a trusting and strong personal bond.<sup>146</sup>

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146. Robert Burt has argued that imposing on lawyers a greater duty of inquiry and disclosure might actually improve lawyer-client relations by insuring that lawyer and client come to know each other more honestly. Robert Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1030-32 (1981). Sometimes, this might be so. Often, however, even if the lawyer's suspicious inquiries elicited more information from her clients (and the

Indeed, in this and a number of other respects the contours of lawyer-client relationships under current rules of ethics seem broadly consistent with the caring lawyer's desire for a meaningful personal connection with her client. The conflict of interest rules bar the lawyer from concealing her potentially divided loyalties from her client;<sup>147</sup> a caring lawyer could readily acknowledge the need for such candor between people who honor their connection with each other. So, too, the requirement of zealous advocacy<sup>148</sup> can be understood in caring terms: the client has come to the lawyer for help, and the duty of zeal expresses the lawyer's responsibility to meet the needs she has agreed to address. The lawyer's devotion to the client's interests also helps win the client's trust, itself an element of the lawyer-client relationship that the caring lawyer will value. All of these factors give the caring lawyer good reason to preserve her client's secrets, and to use what the client tells her only on his behalf.

If the caring lawyer reveals this information, moreover, she not only fails to meet responsibilities she would normally see as appropriate; she also betrays her client. Every departure from complete candor and fidelity is a betrayal of a sort, but a failure to press every claim on a client's behalf, for example, may injure him much less than a failure to keep the secrets vital to his case. Breaching the promise of confidentiality and revealing that a client has committed additional murders is a serious betrayal indeed. To be sure, if the rules of ethics are revised under the influence of the ethic of care so that the lawyer owes her client no duty of confidentiality in circumstances such as the Hidden Bodies case, and if the lawyer communicates that important limitation on confidentiality to her client,<sup>149</sup> then her

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result might actually be quite the opposite), I would expect the emotional effect of such encounters to be damaging or corrosive. See Ellmann, *supra* note 45, at 757 & n.114. In certain cases, as I will suggest, the ethic of care indicates this price is worth paying—but it will be a price.

147. Both the Model Rules and the Model Code authorize the lawyer who has a potentially significant, but not irretrievably damaging, conflict to continue on the case, but only if she first obtains the client's informed consent to the situation. See MODEL RULES, *supra* note 46, Rule 1.7(a)(2), 1.7(b)(2) (requiring "client consent[]" after consultation" in potential conflict situations); MODEL CODE, *supra* note 46, DR 5-105(C) (requiring client consent "after full disclosure" in such circumstances).

148. MODEL CODE, *supra* note 46, DR 7-101; MODEL RULES, *supra* note 46, Rule 1.3 cmt.

149. The Model Rules contain a provision for such a communication: "[w]hen a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct." MODEL RULES, *supra* note 46, Rule 1.2(e). Monroe Freedman sharply criticizes this provision as a path to lawyer-client relations in which lawyers give their clients the equivalent of "Miranda" warnings, and argues that the client's trust in his lawyer will be undermined and communication impeded if the attorney must give such disclaimers. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 111-13 (1990).

In light of the ethic of care, however, Rule 1.2(e) serves two valuable functions. First, it assures that when care does qualify loyalty—as I will argue it sometimes should—the client

disclosure of what she knows will in a sense not be a betrayal. Even then, however, the caring lawyer will be hard pressed to deny the reality of the client's need for her absolute discretion, and likely will be constrained to acknowledge that the client's disastrous candor was the result of the very trust she had made it a priority to engender.

One response to this problem would be that there is no right answer generated by the ethic of care. The responsibility of the caring lawyer is unclear; all that is clear is that she must decide what to do in light of a caring recognition of the substantial concerns on both sides of the issue. Gilligan's discussion suggests that this is her view of at least some dilemmas of care. Thus, she seems to endorse the view of one of her interview subjects, that "'no factor is absolute.' The only 'real constant is the process' of making decisions with care, on the basis of what you know, and taking responsibility for choice while seeing the possible legitimacy of other solutions."<sup>150</sup> Similarly, Rand Jack and Dana Crowley Jack, in their study of the ways that lawyers actually bring the ethic of care to bear on their professional decisions, seem to feel that in a world in which the law's commands are not based on care thinking, the most admirable course for a caring lawyer is to accept, and if need be to suffer with, the tension between her moral concerns and her professional obligations.<sup>151</sup> These

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has an opportunity to urge the lawyer to reconsider before an irreversible breach occurs. The caring lawyer will ordinarily welcome the resultant dialogue as itself a form of connection (though there may be cases in which the lawyer must deny even this connection to forestall ferociously uncaring conduct by her client). Second, by mandating such consultation only when the possibility of an ethical conflict is acute, Rule 1.2(e) wisely avoids the harm to attorney-client relations that could result from highlighting this risk of conflict at the very beginning of the representation. Some general indication that care does set limits on the lawyer's role, however, is likely to be an appropriate part of the lawyer's earliest conversations with many clients. Candor between lawyer and client requires no less. *Cf. supra* text accompanying notes 136-138 (on the need for continued respect for clients' decisionmaking rights). Even with this partial disclosure I acknowledge that some clients may be unpleasantly surprised when the nature of the lawyer's responsibilities is spelled out more precisely later on.

150. GILLIGAN, *supra* note 1, at 148; see Saxton, *supra* note 29, at 66 (interview with Gilligan, in which Gilligan says that a fusing of men's and women's moral views would mean "to live with conflict, to see that there is more than one way, to give up the search for justification, to become more responsive to others and to oneself—in other words, to be mature").

151. Thus, Jack and Jack describe the moral position of those lawyers for whom both care and rights considerations are salient as "the most complex and subtle of the four [moral] positions" they study. To them, this position "maximizes tension within an individual and, at the same time, offers the possibility of access to the strength of both institutional and personal morality." JACK & JACK, *supra* note 3, at 111. In contrast, the authors regard those lawyers who pay serious heed only to considerations of rights as having truncated moral vision, *id.* at 110, and characterize lawyers who consciously depart from the rights-focused obligations of the lawyer's professional role as having gone to "extremes," unnecessarily risking "damage to career, isolation, becoming unmoored from historical and community wisdom, masking immorality as renegade morality, [and causing] injury to a legal system on which depends much that is valuable in our society." *Id.* at 125-26.

positions fit the contextual character of care reasoning, which cautions against offering broad prescriptions that slight the inevitable nuances of the details of any particular case.

But Gilligan's moral stance does not appear to be one of utter relativism. Instead, she appears to take the view that there are at least better and worse approaches to particular situations.<sup>152</sup> Moreover, the fact that the ethic of care does not generate a single, ineluctably "right" answer to a question like this one does not mean that care offers no basis for reaching conclusions; as I have already suggested, few ethical frameworks offer such clear answers as to leave no room for further debate.<sup>153</sup>

Let me, therefore, offer my judgment on the responsibilities of care in this situation: I feel that the refusal to provide a parent with the knowledge of his daughter's fate, and of the location of her unburied corpse, is appalling on a human level. The client's need for the lawyer's discretion is a real concern for the caring lawyer, as is the maintenance of a personal connection to this client. But the uncaring quality of the client's actions, and the likelihood that I would find my own personal care for this client greatly weakened, lead me to say that I believe considerations of care would justify answering the father's question. I would, of course, be pleased if I could persuade the client to agree with me, and I would also be

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152. See *supra* notes 29-30 and accompanying text; John M. Murphy & Carol Gilligan, *Moral Development in Late Adolescence and Adulthood: A Critique and Reconstruction of Kohlberg's Theory*, 23 HUM. DEV. 77, 82-83, 97 (1980) (seeming to accept, as a part of mature moral reasoning, a position of "contextual relativism . . . the position that while no answer may be objectively right in the sense of being context-free, some answers and some ways of thinking are better than others"—though disclaiming any intention to argue for the superiority of "contextual theories of philosophy"); Saxton, *supra* note 29, at 66 (interview with Gilligan, in which Gilligan maintains that "[w]omen say that they don't have a clear rule for moral decisions in the sense of a Categorical [sic] Imperative or Golden Rule, but they do have a sense of how you make a moral decision. That is, to pay attention to everything, to see and to know as much as you can about yourself and others and the situation so that you can try to anticipate the consequences of action and act in a way that is not likely to cause suffering and hurt"); but cf. Flanagan & Adler, *supra* note 34, at 591-92 (questioning the meaning of "contextual relativism"). Other feminists have taken similar positions. See Bartlett, *supra* note 33, at 880-87 (advocating feminist "positionality," which "acknowledges the existence of empirical truths, values and knowledge, and also their contingency," *id.* at 880, and "sets an ideal of self-critical commitment whereby I act, but consider the truths upon which I act subject to further refinement, amendment, and correction."); cf. Seyla Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Moral Theory*, in WOMEN AND MORAL THEORY 154, 158-59 (Eva F. Kittay & Diana T. Meyers eds., 1987) (maintaining that "normative disputes can be rationally settled," but that the process of their settlement requires concrete political struggle that "regards difference as a starting point for reflection and action" and seeks to "develop[] moral attitudes and encourag[e] political transformations that can yield a point of view acceptable to all").

153. See *supra* text accompanying note 17.

happy if I could arrange the revelation so as to minimize the resultant damage to my client's interests.<sup>154</sup>

I have spoken here of my own reactions as I imagine they would be in this situation. It might be objected that these reactions are mine alone, and thus that I have after all found no guidance on the ethic of care's meaning for any other lawyer. This objection, however, is unpersuasive. What I have tried to do is to set out the elements of the judgment of care I would make. Perhaps other lawyers would respond to the situation differently—for example, by finding the refusal to answer the father's question *not* appalling on a human level. But my answer would not be irrelevant to their judgments, nor would theirs be irrelevant to mine. They and I would need to examine the differences in our responses, and to consider whether in one way or another our responses failed to reflect our commitment to the ethic of care. After carrying out such a reconsideration, they—or I—may then reach different conclusions. That different people may respond differently provides the grist for ethical discussion, debate, and judgment; it does not make any one person's response simply incommensurable with others, nor render the ethic each employed in responding meaningless.<sup>155</sup>

If the judgment I have offered is persuasive, then we have identified an instance in which the present rules of ethics should give way to considerations of care; we are also in a position to identify other, similar cases. It seems likely that there are a number of such instances—typically, the very situations that are sometimes made the focus of ethics teaching today. For example, the ruthless and psychologically damaging cross-examination of a truthful rape complainant, designed to make her honest testimony look

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154. There might be no easy or comfortable way to respond to the father's plea while minimizing the damage. Perhaps the lawyer could decline to answer the father directly, but supply anonymous information to the authorities—yet the covert quality of this solution is troubling, as is the lawyer's avoidance of any direct response to the father himself. In other circumstances, the lawyer might feel less need for anonymity because she could provide information without unmistakably pointing to her client's guilt. Thus, an Atlanta lawyer named Arthur Powell, whose client confessed to him that he had committed a murder for which another man, Leo Frank, faced execution, may have helped persuade the Georgia governor to commute Frank's sentence when he "contacted the governor and asserted Frank's innocence, but refused to identify the source of his information." RHODE & LUBAN, *supra* note 143, at 257. (Frank, however, was lynched by an antisemitic mob not long afterwards, in 1915, in an event that played a part in the revival of the Ku Klux Klan. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 185-86, 286-87 (1969)).

155. Such differences among people committed to the same framework of ethical judgment, however, may well reflect that much more goes into ethical decisionmaking than has been captured in any of the frameworks we now study, including the ethic of care. See *supra* note 34 (discussing the possible incompleteness of the justice and care frameworks).



like a lie, might be unacceptable in a system responsive to care concerns<sup>156</sup>—although some caring lawyers currently grit their teeth and carry out such tasks.<sup>157</sup> So, too, a lawyer for a wine maker, who knows that by invoking some available procedural mechanism she can forestall a Food and Drug Administration ban on an ingredient in her client's wine long enough for the client to complete shipping the current inventory, might feel a caring responsibility not to take this step if she is convinced that the FDA has correctly determined that this ingredient is carcinogenic.<sup>158</sup> Failure to reveal to the plaintiff's counsel in a personal injury case that a medical

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156. For one ethics text's discussion of this and related problems, see RHODE & LUBAN, *supra* note 143, at 277-311 (discussing "truthful witnesses and lying clients"). Under current rules of ethics, at least if the client insists on such a cross-examination and it is the most effective strategy available to win the case, I believe lawyers are obliged to carry it out unless they are allowed to withdraw from the case instead. Characteristically, however, the codes leave this point at least somewhat ambiguous. Thus, the Model Code directs that "[a] lawyer shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules." MODEL CODE, *supra* note 46, DR 7-101(A)(1). The same section also declares, however, that the lawyer does not violate this rule "by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process," and these words could be read to encompass this cross-examination. Even more puzzlingly, DR 7-101(B)(1) allows the lawyer, "[w]here permissible, [to] exercise his professional judgment to waive or fail to assert a right or position of his client." *Id.* DR 7-101(B)(1) (emphasis added). Just when such conduct *is* permissible the Disciplinary Rules do not say.

The Model Rules are also ambiguous, though perhaps not as vividly. Rule 1.2(a) directs the lawyer to "consult with the client as to the means by which [the client's objectives] are to be pursued." MODEL RULES, *supra* note 46, Rule 1.2(a). The comment to this Rule says that "[i]n questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as . . . concern for third persons who might be adversely affected." *Id.* Rule 1.2 cmt. This guidance might seem to oblige the lawyer to put aside her reluctance and carry out this cross-examination (since her only objection to it stems from her concern for third persons, not from any doubt as to its efficacy). But another portion of the same comment says that "a lawyer is not required to . . . employ means simply because a client may wish that the lawyer do so." *Id.* A comment to the following rule seems to go even further, telling us that "a lawyer is not bound to press for every advantage that might be realized for a client." *Id.*, Rule 1.3 cmt.

157. Abbe Smith describes the response of a public defender who had successfully defended an accused rapist, only to have him arrested for two more rapes. This lawyer felt that she had "trebled" the first victim's victimization. Smith, *supra* note 35, at 55. Smith continues:

As to how she lives with it, or lives with herself, my friend is matter of fact: "I live with it." When pressed to explain, she says, "Look, life is complicated. Being a criminal lawyer is complicated. Being a feminist and a public defender is complicated. If you can't live with a little complexity, what's the point?"

*Id.* at 56.

158. This example is Alan Goldman's. See ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 102, 146 (1980). If the caring lawyer can properly decline to use the delaying tactic here, or to carry out the cross-examination in the rape case, she nevertheless would ordinarily have a responsibility to inform her client of her decision and to take seriously her client's response. See *supra* note 149.

examination of the plaintiff conducted for the defense has discovered an additional, life-threatening injury also seems hard to sustain in care terms.<sup>159</sup> So would a failure to reveal a client's imminent plan to commit a violent crime—a matter whose revelation current rules appear to leave entirely to the attorney's discretion.<sup>160</sup>

Yet, the very analysis that generated the conclusion that care called for revelation of the hidden bodies also suggested that the broad contours of the attorney-client relationship, as it now exists, are consistent with the ethic of care.<sup>161</sup> The Model Code and Model Rules embody and reinforce values of loyalty and trust, values that are as integral to relationships between two *people* as they are to the encounters between lawyer and client. So, too, the various examples just given seem to argue against the extremes of zealous advocacy, rather than against the fundamental idea that a lawyer who decides to represent someone can fairly be asked, as part of that decision, to promise her client discretion, fidelity, and effort on his behalf.<sup>162</sup> This is not to deny that discretion, fidelity, and effort on one

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159. For such a case, see *Spaulding v. Zimmerman*, 116 N.W.2d 704, 710 (Minn. 1962). Whether nondisclosure is permitted under current law depends on the scope of the existing ethical duty not to engage in conduct amounting to a misrepresentation. Modern tort and contract law, from which lawyers are presumably not generally exempt even in their activities on behalf of clients, imposes significant obligations not only to avoid false statements but also "in some circumstances . . . to disclose facts." See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 13.5.7 (Student ed. 1986).

Wolfram believes that the extent to which the Model Code and Model Rules incorporate such duties of disclosure "is problematical." *Id.* § 13.5.8. Model Rule 4.1(a)'s text only explicitly bars lawyers from "knowingly . . . mak[ing] a false statement of material fact or law to a third person," but the comment to the rule, observing that "misrepresentations can also occur by failure to act," arguably reaches further. MODEL RULES, *supra* note 46, Rule 4.1(a) and cmt. Wolfram suggests that Model Code DR 7-102(A)(7), which bars a lawyer from "assist[ing] his client in conduct that the lawyer knows to be illegal or fraudulent," could prohibit intentional failures to disclose information. WOLFRAM, *supra*, § 13.5.8. This reading might be undercut, however, by Model Code DR 7-102(B)(1), which limits at least to some extent the corrective action lawyers can take when they discover that their clients have "in the course of the representation, perpetrated a fraud." MODEL CODE, *supra* note 46, DR 7-102(B)(1).

160. MODEL RULES, *supra* note 46, Rule 1.6(b)(1) & cmt. [13]; MODEL CODE, *supra* note 46, DR 4-101(C)(3). So, too, it seems to me that considerations of care would call on the lawyer whose client confessed to a murder, for which another man was about to be executed, to insure that this miscarriage of justice did not take place. For an actual example of such a case, see the description of the Leo Frank case, *supra* note 154.

161. See *supra* text accompanying notes 146-148.

162. This conclusion might be accepted, and yet it might be suggested that the ethic of care does not support such requirements when the client is not an individual person, or even an identifiable group of people, but a large, faceless entity. Here, it might be said, the caring lawyer no longer has any actual person to care for, and she will not find attractive the notion of caring for an "artificial person" such as a corporation. Cf. LUBAN, *supra* note 65, at 206-34 (arguing against the need for attorney-client confidentiality when the client is a "large or bureaucratic organization"). I agree that caring lawyers will not view corporate or other organizational clients in quite the same light as they will their individual clients. I do

person's behalf may result in injury to others, although usually this injury will be less horrific than in the cases I have mentioned as calling for departures from zeal. Nor is it to say that the caring lawyer will contribute readily to such injury—she will not; instead, she will seek to reshape situations and counsel clients so as to vindicate connection rather than to inflict harm. Nor, again, is it to say that the caring lawyer will quickly undertake cases in which she sees the prospect of acting uncaringly. This factor *will* weigh against her taking on a case in the first place—but it will not weigh against it absolutely, because other factors of care may still justify her representation.<sup>163</sup>

I do suggest, however, that in general the caring lawyer will be prepared to undertake a relationship in which she may find herself constrained to contribute to harming others. As we have already seen, the ethic of care recognizes that a caring person will sometimes, deliberately and justifiably, hurt other people.<sup>164</sup> The caring lawyer will be prepared to do so—though not eager—because she will see the situations that bring people to lawyers as being circumstances in which it is possible that connection cannot be fully sustained, and that injury will have to be inflicted, as a result of the differing wishes and needs of the contending parties.<sup>165</sup> Recognizing that lawyers are often consulted precisely because care has been ruptured, she

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not think, however, that this difference suggests a fundamental abrogation of duties of confidentiality, fidelity, and effort in the case of entity clients. Organizations, after all, are organizations of people; they are run by people, owned by or on behalf of people, and staffed by people, all of whose well-being may be affected by the course of the organization's legal affairs. Some of these people, moreover, will be people with whom the lawyer works directly, in the service of the organizational task; no doubt she will come to form and honor connections with these actual individuals, whatever her feelings towards the entity of which they are a part. If, as I have argued, confidentiality, fidelity, and effort are broadly consistent with the ethic of care in the representation of individual clients, I do not think they are broadly inconsistent with this ethic when the clients are organizations.

163. See *supra* text accompanying notes 46-74 (discussing the factors that will guide a caring lawyer's choice of cases).

164. See *supra* notes 48-55 and accompanying text. There I focused on the caring person's decision to hurt another person in order to avoid hurt to herself, but such conduct would be no less appropriate as a consequence of her care for a third party.

165. This view of legal conflict resembles the perspectives of Shaughnessy, *supra* note 19, at 20-21, who comments that "even in the most intimate areas of life, the law is most immediately present when voluntary relationships no longer work"; of Massaro, *supra* note 19, at 2122, who argues that "[o]nly when we begin to disagree do we need legal decisionmakers to order or reconcile our conflicting views"; and of Waldron, *supra* note 34, at 634, who maintains that "it is important for there to be a structure of rights that people can count on for organizing their lives, a structure which stands somewhat apart from communal or affective attachments and which can be relied on to survive as a basis for action no matter what happens to those attachments." But this perspective does not require the caring lawyer to despair of resolving ethical problems in care terms. As I have sought to argue in this article, the ethic of care does speak to the moral dilemmas encountered even in the world of law and hurt.

will see the elements of care involved in representing people in such circumstances as outweighing the prospect of doing uncaring harm if her efforts to find a better resolution are unsuccessful. She will in general prefer to sustain the responsibility for doing such harm rather than undertake representation with an ever-present and profound qualification on the commitment, and thus in a sense the care, that she offers her client—namely, her intention to depart from discretion, or fidelity, or effort on her client's behalf whenever uncaring injury might otherwise result.

How, then, should the qualifications on the normally applicable responsibilities of discretion, fidelity, and effort be expressed? Plainly no rule of law could ever hope to identify, in advance, each of the circumstances in which these qualifications would come into play. One possibility would be to leave them unexpressed and to place on the individual, caring lawyer the moral onus of violating the rules when she sees reasons of care that justify doing so. Such a system could satisfactorily accommodate the considerations of care, but only if individual lawyers can muster both the judgment to know when to violate the rules, and the courage to act on their judgments in the face of the possibility that others will disagree and that discipline will result.<sup>166</sup> If lawyers lack these qualities, however, this ethical burden is more likely to produce both idiosyncratic decisions by individuals and a general, understandable reluctance to run the risks involved in violating the rules for the sake of care. Yet, even this outcome might be tolerable if the alternative were to allow lawyers a discretion so unbounded that the rules' authoritative articulation of the normal responsibilities of lawyering would be dissipated both by inconsistency and by outright corruption masquerading under the name of care. Since blatant departures from the rules of ethics seem to be disturbingly common even under the current, nominally less discretionary regime,<sup>167</sup> this is no trivial danger.

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166. Richard Goldstone, a prominent South African judge who now heads a judicial commission widely credited with essential contributions to preserving the prospects of a negotiated end to apartheid, once responded (in an ethics class he and I co-taught) to the question of how he would handle the Hidden Bodies case. His answer was that if he were the lawyer in that case he would reveal the information, and at once report himself to the Bar Council (the governing body of the South African bar), from which he was confident he would receive vindication of the propriety of his departing from a duty of confidentiality that otherwise he saw as unqualified. This answer bespeaks a sense of the bar as a solidary, consensual body of people. I do not invoke South Africa in order to vilify this image of the legal profession, for the South African bar—though far from enjoying an unblemished record—has made some striking contributions to human rights in the midst of oppression, and its very solidarity and cohesiveness may have contributed to its doing so. See STEPHEN ELLMANN, *IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* 205-44 (1992). But it is hard to believe that in the vastly larger and more diverse American legal profession such a system of firm rules and consensual agreement on their unstated exceptions could possibly take hold.

167. For an unnerving example, see generally the study of lawyers' dealings with their clients by Lisa Lerman, *Lying to Clients*, 138 U. PA. L. REV. 661 (1990).

But there is another alternative, one that would borrow caring methods to promote caring results. Substantively, this alternative is to admit, or rather to announce, in the rules of ethics that they are subject to exceptions when considerations of care justify making them.<sup>168</sup> The rules need not be so laconic as this, of course. Rather, they should also set out what could be called, borrowing the language of the Model Code of Professional Responsibility,<sup>169</sup> "ethical considerations of care," which would explicate the nature of the reasons of care that would provide such justification, and explain as well the general range of circumstances in which no exception is expected to be proper.

In addition, this alternative would have a procedural side, based on a recognition that making such exceptions ought not to be a matter for individual lawyers to decide alone. Although the decision will ultimately be up to the lawyer, and her judgment could ultimately be the subject of disciplinary proceedings, both the solitary decision and the punitive response could be forestalled by requiring or strongly encouraging ethical consultation. If, as Gilligan suggests, candid communication can refine moral judgments,<sup>170</sup> lawyers should find this method valuable as well. The

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168. There will also be instances in which the rules need modification to enjoin lawyers to respond to considerations of care in their decisionmaking. So, for example, lawyers should at least be called upon to take these considerations into account in deciding whether to reveal the information that their client plans to commit a violent crime. Better still, in care terms, lawyers should probably be called upon to reveal such information unless considerations of care justify *not* doing so. Certainly the choice to make such disclosures should not be left to the unchallengeable discretion of each lawyer, as it now appears to be. See *supra* note 160 and accompanying text.

169. MODEL CODE, *supra* note 46.

170. Gilligan writes that Amy "see[s] the actors in the [Heinz] dilemma . . . as members of a network of relationships on whose continuation they all depend. Consequently her solution to the dilemma lies in activating the network by communication, securing the inclusion of the wife by strengthening rather than severing connections." GILLIGAN, *supra* note 1, at 30-31. Elsewhere Gilligan discusses the perception of a caring lawyer, Hilary, who "realized that the adversary system of justice impedes not only 'the supposed search for truth' but also the expression of concern for the person on the other side." *Id.* at 135.

Carrie Menkel-Meadow has explored the question of how to design a system of dispute resolution that would better express the moral perspective of Amy and Hilary, and suggests that "the growing strength of women's voice in the legal profession may change the adversarial system into a more cooperative, less war-like system of communication between disputants in which solutions are mutually agreed upon rather than dictated by an outsider, won by the victor, and imposed upon the loser." Menkel-Meadow, *supra* note 3, at 54-55. Paul Spiegelman similarly maintains that Amy "prefers nonadjudicatory modes of dispute resolution such as negotiation and mediation—modes that emphasize cooperative problem solving and achieve 'win-win' rather than 'win-lose' solutions—for settling disputes." Spiegelman, *supra* note 9, at 249.

The process of ethical consultation I suggest in the text is meant to encourage the open communication that Gilligan suggests can "activat[e] the network of relationships" and thereby generate wise, caring decisions. I believe it would do so more effectively than exclusive reliance on systems (such as the issuance of advisory opinions by bar ethics

lawyer facing an ethical dilemma should be called upon to meet with a group of her peers—understood broadly, to include not only other lawyers but also other people committed to moral discourse<sup>171</sup>—to discuss and attempt to resolve the question. Perhaps they will find an answer the lawyer can accept, perhaps not. But the process of consultation can refine the decisions of those lawyers who take it seriously, and add a hurdle to the plans of lawyers who might hope to circumvent the substantive responsibilities set out in the ethics codes.<sup>172</sup>

I offer this alternative, and especially its procedural component, tentatively. Perhaps there are better procedural mechanisms that could be designed; perhaps experimentation with the process I have suggested would reveal it to be unworkable. But the ethic of care speaks to process as well as substance, and if it is to become central to lawyers' professional lives, then its insights ought to be brought to bear not only on the general declaration of lawyers' responsibilities, but also on the particular decisions about those responsibilities that must be made.

The practical questions entailed in recasting the professional codes to better express the intersection of care and zeal are particularly important if the lessons of care in this respect are ones we wish to heed. I propose that we should heed them. As I have interpreted those lessons, they do not require us to abandon the general contours of our understanding of attorneys' roles, but instead reaffirm the value of lawyers' discretion, fidelity, and effort on their clients' behalf. At the same time, as I have

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committees) that may be more formal, more hierarchical, and less concerned to engage the worried lawyer in a sustained conversation about her moral concerns. The question of what processes best serve caring objectives, however, remains a subject of debate, as some observers discern even in informal structures the presence of troublingly coercive pressures on their participants. See Sally E. Merry, *Culture, Power, and the Discourse of Law*, 37 N.Y.L. SCH. L. REV. 209, 215 (1992) (observing that "in mediation as in court, the nature of the interpretation imposed on a case shapes its outcome"); Resnik, *supra* note 22, at 1940-43 (denying that feminism demonstrates the desirability of abandoning the institution of adjudication, while welcoming feminist reconsideration of "current modes of adjudication"); Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 L. & INEQ. J. 21, 27 (1984) (identifying unanswered questions about the "practice of mediation"). The actual operation of my proposed system of consultation would certainly deserve careful evaluation as well.

171. Deborah Rhode has repeatedly urged that ethical regulation of the legal profession should not be exclusively the province of lawyers. See, e.g., Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 293 (1986) (calling for the involvement of "politically accountable representatives"—"regulators further removed from professional tutelage"—in bar reform).

172 I suggest that these conversations should be privileged against disclosure, so as to encourage candid discussions, albeit at the cost of some of the process' *in terrorem* effect on would-be rule manipulators. There is no reason, however, that these conversations should be more privileged than those between lawyer and client, and so it would be appropriate to make the privilege subject to override when considerations of care call for that result.

tried to illustrate in discussing the Hidden Bodies case, the ethic of care abandons the complete insulation of heartlessness that sometimes seems implicit in current formulations of lawyers' ethics. Perhaps any diminution in the relentlessness of adversary zeal is a grave threat to our liberties—but I do not think so. Instead, I suggest that the ethic of care offers a basis for modifying current notions of lawyering that is welcome precisely because it does not rewrite these conceptions more drastically. In tempering the extremes of lawyers' advocacy, while preserving the core idea of the lawyer as her client's advocate, the ethic of care would enhance our definitions of lawyers' responsibilities.

#### CONCLUSION

This article has traced the implications of the ethic of care for legal ethics. Those implications are significant and even startling. Lawyers' choices of cases would be significantly affected by their acceptance of the centrality of considerations of care; so would the nature of their relationships with their clients; and so too would the kind of representation their clients would receive. In many ways, these changes seem attractive, for they would make the profession more attentive to the harm it can do and to the people it acts for and against. At the same time, some of these changes are disturbing; the framework of care offers clients less security for their autonomous decisionmaking, and less certainty of their lawyers' fidelity, than would an approach more focused on client rights.

Yet, it deserves to be emphasized that the lawyer-client relationships that the ethic of care calls for are not vastly different from those permitted under existing rules. Under existing ethical rules, lawyers can already choose to decline cases based on considerations of care; so, too, they can form close relationships with their clients and counsel them vigorously. In addition, they often have a variety of tools available by which they can, within the confines of existing rules, avoid the most ferocious implications of an emphasis on the protection of every person's autonomy before the law. It should not surprise us that the implications of care morality, significant though they are, are not more radical and novel. After all, the ethic of care is an ethic available to both men and women, and it appears to be a part of the moral thinking of women and men of our day. It is *already* part of our moral universe, and this effort to determine what the implications of making it central would be has in a sense confirmed how central to lawyers' thinking it already is.